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PROCEEDINGS AND ORDERS

DATE: 111984

CASE NBR 83-1-01722 ATX
SHORT TITLE MS Republican Executive
VERSUS Brooks, Owen H., et al.

DOCKETED: Apr 20 1984

Date	Proceedings and Orders
Apr 20 1984	Statement as to jurisdiction filed.
Mar 23 1984	Application for stay filed, and order denying same by White, J., on March 26, 1984.
Mar 27 1984	Application refiled with Stevens, J.
Apr 2 1984	Application for stay denied by order of the Court.
May 11 1984	Order extending time to file response to jurisdictional statement until June 16, 1984.
May 11 1984	This extension of time applies to all respondents.
Jun 16 1984	Brief of appellee State of Mississippi in support of petition filed.
Jun 18 1984	Motion of appellees Brooks, Owen H., et al. to dismiss or affirm filed.
Jun 15 1984	Order further extending time to file response to jurisdictional statement until June 18, 1984.
Jun 20 1984	DISTRIBUTED. September 24, 1984

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PROCEEDINGS AND ORDERS

DATE: 111984

CASE NBR 83-1-01722 ATX
SHORT TITLE MS Republican Executive
VERSUS Brooks, Owen H., et al.

DOCKETED: Apr 20 1984

Date	Proceedings and Orders
Jun 20 1984	REDISTRIBUTED. September 24, 1984
Jul 12 1984	Record requested.
Jul 19 1984	Record filed.
Aug 20 1984	Reply brief of appellant MS Republican Executive Committee filed.
Oct 1 1984	REDISTRIBUTED. October 5, 1984
Oct 1 1984	REDISTRIBUTED. October 5, 1984
Oct 9 1984	REDISTRIBUTED. October 12, 1984
Oct 9 1984	REDISTRIBUTED. October 12, 1984
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 18 1984	REDISTRIBUTED. October 26, 1984
Oct 23 1984	Supplemental brief of appellant MS Republican Executive (to be printed) filed.
Oct 29 1984	REDISTRIBUTED. November 2, 1984
Oct 29 1984	REDISTRIBUTED. November 2, 1984

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PROCEEDINGS AND ORDERS

DATE: 111984

CASE NBR 83-1-01722 ATX
SHORT TITLE MS Republican Executive
VERSUS Brooks, Owen H., et al.

DOCKETED: Apr 20 1984

Date	Proceedings and Orders
Nov 5 1984	REDISTRIBUTED. November 9, 1984
Nov 5 1984	REDISTRIBUTED. November 9, 1984
Nov 13 1984	Judgment AFFIRMED. Concurring opinion by Justice Stevens. Dissenting opinion by Justice Rehnquist with whom The Chief Justice joins. (Detached opinion.)

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JURISDICTIONAL STATEMENT

83 - 1722

(1)

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,
APPELLANTS

v.

OWEN H. BROOKS, ET AL.,
APPELLEES

On Appeal From The United States District Court
For The Northern District Of Mississippi

JURISDICTIONAL STATEMENT

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*MICHAEL B. WALLACE

JONES, MOCKBEE & BASS
1080 Flynt Drive
Suite E
P. O. Box 55507
Jackson, Mississippi 39216
Tel. (601) 939-3895

Attorneys for Appellants

**Counsel of Record*

81 pp

QUESTIONS PRESENTED

1. Whether Section 5 and Section 2 as amended apply to redistricting decisions.

2. Whether the amendment to Section 2 or any other portion of the Voting Rights Amendments of 1982 has any bearing upon litigation under Section 5.

3. Whether Section 2 as amended prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race.

4. Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment.

PARTIES TO THE PROCEEDING BELOW

The Appellants, the Mississippi Republican Executive Committee, were Defendants in one of the two consolidated actions below. The other Defendants, Appellees herein, are: Bill Allain, Governor of Mississippi, replacing former Governor William Winter pursuant to this Court's Rule 40.3; Edwin Lloyd Pittman, Attorney General, replacing Bill Allain in that capacity; Dick Molpus, Secretary of State, replacing Edwin Lloyd Pittman in that capacity; the State Board of Election Commissioners; Mississippi Democratic Executive Committee. The following Defendants were dismissed by order of the District Court on May 7, 1982: Brad Dye, Lieutenant Governor; Clarence B. "Buddie" Newman, Speaker of the House of Representatives; T. H. Campbell III, Chairman, Bill Harpole, Vice-Chairman, and J. C. "Con" Maloney, Secretary, of the Joint Congressional Redistricting Committee.

Plaintiffs in the consolidated actions below, Appellees herein, are: Owen H. Brooks, Reverend Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Reverend Carl Brown, June E. Johnson, and Lee Ethel Henry, individually and on behalf of all others similarly situated; and David Jordan and Sammie Chestnut, on behalf of the Greenwood Voters League, individually and on behalf of all others similarly situated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution, statutes **Page**

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,
APPELLANTS

v.

OWEN H. BROOKS, ET AL.,
APPELLEES

On Appeal From The United States District Court For The Northern District Of Mississippi

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The original opinion of the United States District Court for the Northern District of Mississippi in this case was rendered on June 8, 1982, and is reported at 541 F. Supp. 1135 (N.D. Miss. 1982). A copy of the Court's opinion and Order is set out in Appendix A. On a previous appeal, this Court vacated the District Court's Order and remanded "for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973, as amended in 1982." *Brooks v. Winter*, _____ U.S. _____, 103 S. Ct. 2077 (1983). On remand, the District Court, without issuing an opinion, entered a new and different Judgment on January 6, 1984. A copy of that Judgment is set out as Appendix B. A Motion by these Appellants to Amend the Judgment was denied on January 20, 1984, and an Order clarifying that decision was entered on January 25, 1984. Copies of those orders are set out as Appendices C and D.

JURISDICTION

This suit began as an effort to enjoin the use of two Congressional districting plans, an existing plan which had become malapportioned due to population changes and a new plan, passed by the Mississippi Legislature, to which the Attorney General had objected pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. On remand, by direction of this Court, the District Court considered whether its original remedial plan was consistent with Section 2 of the Voting Rights Act. The District Court entered its Judgment on January 6, 1984, and it denied a Motion to Amend the Judgment on January 20, 1984. On March 2, 1984, within the time permitted by 28 U.S.C. §2101(b), the Republican Appellants filed with the District Court their Notice of Appeal, a copy of which is set out as Appendix E. This appeal is being docketed in this Court within sixty days from the filing of the Notice of Appeal, as provided by this Court's Rule 12.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Fifteenth Amendment, and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, 1973c, are set out in Appendix F.

STATEMENT OF THE CASE

In 1980 the State of Mississippi, through the agency of the Republican Appellants and other Defendants, conducted its Congressional elections according to a plan passed by the Legislature in 1972 and approved by the Attorney General of the United States pursuant to his authority under Section 5 of the Voting Rights Act. Both the plan and its approval were based on this Court's rejection of constitutional challenges to its almost identical predecessor. *Connor v. Johnson*, 386 U.S. 483 (1967). In 1981, the Legislature adopted a nearly identical redistricting plan, making only those changes necessary to minimize population variations. Nevertheless, the Attorney General, pronouncing himself unbound by the prior approval given to the basic scheme by this Court and his own Department, objected to the new plan. As a result, the District Court enjoined the use of the 1981 plan, as well as the 1972

plan which had become malapportioned due to the 1980 census, and ordered its own plan into effect.[1] The Department of Justice found that the Court's plan fully satisfied its Section 5 objections. Brief for the United States as Amicus Curiae at 11-12, *Brooks v. Winter*. In 1983 this Court vacated that Order, and instructed the District Court to reconsider these cases in light of newly amended Section 2.

On remand, the District Court found that its own plan, endorsed by the Justice Department, violated newly amended Section 2, particularly in the Second District. See p. 25a, *infra*. In its 1982 opinion, the District Court, relying on *Upham v. Seamon*, 456 U.S. 37 (1982), had chosen to effectuate three state policies in addition to the constitutionally compelled policy of minimizing population deviation: minimizing the changes from the 1972 district lines, preserving the electoral base of incumbent Congressmen, and establishing two districts with at least 40% black population. See p.12a *infra*.[2] On remand, however, ruling from the bench at the close of the trial, the Court disregarded each of these policies, except for the preservation of incumbents "where possible," and, as its sole substantive criterion, instructed the parties to draw a plan to "[m]aximize the black population in District 4." *Id.*, at 28a.[3]

The Court's Judgment did not address the question of the constitu-

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[1] The State of Mississippi, which is not a party to this case, sought from the United States District Court for the District of Columbia a declaratory judgment under Section 5 authorizing the use of the 1981 plan. The District Court, however, in an opinion denying the State's Motion for Partial Summary Judgment, ruled that the Mississippi District Court's 1982 plan would be used as the benchmark against which the 1981 plan would be judged for retrogression. *Mississippi v. Smith*, 541 F. Supp. 1329 (D.D.C. 1982), appeal dismissed, _____ U.S. _____, 103 S. Ct. 1888 (1983). The State moved voluntarily to dismiss its own action, without prejudice, because of the exorbitant expense of conducting voting rights litigation. "State drops court approval fight," Clarion-Ledger (Jackson, Miss.), Mar. 29, 1983, at A1. The Republican Appellants in this case were not parties to that proceeding, and the State did not consult them before making its decisions.

[2] On remand in *Upham*, the District Court rejected a Section 2 challenge to the validity of these same policies as applied in Texas. Civ. No. P-81-49-CA, slip op. at 12-17 (E.D. Tex. 1984).

[3] The Court announced its own plan for the Second District at the close of the trial, without the assistance of the parties. Under the Court's 1982 plan,

(Continued on pg. 4)

tionality of Section 2, previously raised by the Defendants, so the Republican Appellants put the issue squarely to the Court by their Motion to Amend the Judgment. The Court denied that Motion and later issued a clarifying Order, specifying that "the court addressed the merits of said motion, reaffirming the constitutionality of Section 2." *Id.*, at 36a. The Republican Appellants filed their Notice of Appeal on March 2, 1984, and on April 2, 1984, this Court denied their Application for Stay and for Reinstatement of Prior Judgment Pending Appeal. *Mississippi Republican Executive Committee v. Brooks*, No. A-766, 52 U.S.L.W. 3720 (U.S. Apr. 2, 1984).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents to this Court for the first time questions of the construction and the constitutionality of the newly amended version of Section 2 of the Voting Rights Act. Those issues have been hotly contested all over the South in cases challenging the legitimacy of Congressional redistricting, legislative redistricting, and the structure of local governments. See e.g., *Velasquez v. City of Abilene*, No. 82-1630 (5th Cir. Mar. 2, 1984) (city government); *Gingles v. Edmisten*, No. 81-803-CIV-5 (E.D.N.C. Jan. 27, 1984), application for stay denied, No. A-653, 52 U.S.L.W. 3650 (U.S. Mar. 5, 1964) (legislative redistricting); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (Congressional redistricting). Because Section 2 applies to the entire United States, the jurisprudence being developed in the lower courts will eventually be applied throughout the country. The courts, the governments, and the private citizens presently struggling with these questions deserve this Court's guidance at the earliest possible date.

(Continued from pg. 3)

the Second District had a black population of 53.77% and a black voting age population of 48.06%. The new plan increases those percentages to 58.30% and 52.83%, respectively. *Id.*, at 33a. Most of the testimony at the trial concerned the fact that in 1982 a white Republican had defeated a black Democrat in the Second District by only 2,303 votes. The District Court, by adding 13,291 blacks of voting age to the Second District, apparently intended to insure that such a thing could not happen again. The Court's 1984 Judgment removed four counties from the east side of the Second District, and added two counties to the south end of the District, creating a District meandering some 250 miles down the Mississippi River from the suburbs of Memphis to the outskirts of Natchez.

The lower courts are presently applying several different interpretations of the statute, none of which are consistent with its plain language as interpreted by this Court's precedents. Many courts, including the District Court in this case, are applying the statute in an attempt to insure control by particular racial groups over the election of candidates to particular offices. Such efforts in the direction of proportional representation are prohibited by the language of the statute and by the statements of its supporters, including the President of the United States. This Court ought not to perpetuate these misconstructions of Section 2 by a summary affirmance, but should grant plenary review to prevent further misapplications of the law.

If this Court agrees with the District Court's construction of Section 2, then it must consider whether Congress can constitutionally impose such a burden upon state and local governments.[4] This Court has previously struck down as unconstitutional one provision of the Voting Rights Act, and has sustained other provisions only on the basis of exceptional circumstances not present here. This Court has never resolved a constitutional challenge to the Voting Rights Act by summary affirmance. See, e.g. *City of Rome v. United States*, 446 U.S. 156 (1980); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Plenary consideration is plainly appropriate on this appeal.

The Republican Appellants also ask this Court to reconsider its construction of Section 5 first enunciated in *Allen v. State Board of Elections*, 393 U.S. 544 (1969). Congress and the President have never ratified *Allen*, and a majority of the Justices of this Court have previously indicated their disagreement with its holding. The efforts of Congress and the courts over the last fifteen years to apply other provisions of the Voting Rights Act in a manner consistent with *Allen* has resulted in severe disruptions of the Act's basic scheme. This Court should now undertake the re-examination of *Allen* so often foreshadowed in its previous opinions.

Given the profusion of diverse applications of the new amendment in the district courts, this Court might quite reasonably wish to give other courts of appeals the chance to review these cases before attemp-

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[4] The Solicitor General is being served with a copy of this Jurisdictional Statement, as required by this Court's Rule 28.4(b). So far as Appellants are aware, the District Court did not certify the constitutional issue to the Attorney General pursuant to 28 U.S.C. §2403(a).

ting a final resolution of the issues presented in this appeal. A summary affirmance, however, being a judgment on the merits, would preclude, not permit, further experimentation in the lower courts. Before this Court takes such a drastic step, oral argument should be heard. This appeal provides a particularly good opportunity to provide guidance, because it involves solely issues of law, and not peculiar matters of disputed fact.

I. NEITHER SECTION 2 NOR SECTION 5 OF THE VOTING RIGHTS ACT APPLIES TO LEGISLATIVE REDISTRICTING DECISIONS.

This suit was originally filed because the Attorney General failed to approve the State's Congressional redistricting plan passed in 1981. If Section 5 does not apply to redistricting decisions, then the Attorney General had no authority to object to the 1981 plan, and the District Court's Judgment should be reversed and the Complaint dismissed. If Section 5 does apply to redistricting decisions, then the District Court in 1982 imposed a remedial plan perfectly consistent with that Section's requirements. This Court vacated that Judgment to consider whether or not the newly amended version of Section 2 had any bearing on the case. The District Court believed that it did, and imposed a new remedial order. Should this Court agree with the Republican Appellants that Section 2 has no application to redistricting decisions, then the District Court's latest Judgment must be vacated and its earlier Order reinstated. The Republican Appellants raised both of these issues in their Supplemental Pretrial Brief submitted to the District Court, although they freely admitted the District Court had no authority to disregard *Allen*. See *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), prob. juris. noted, No. 83-812, 52 U.S.L.W. 3719 (U.S. Apr. 2, 1984).

The Republican Appellants take the position, rejected by a majority of this Court in *Allen*, that the preclearance provisions of Section 5 apply only to changes in election laws bearing upon registration and voting. This Court's extension of preclearance to cover any governmental activity having the remotest bearing upon the electoral process has created a statute which never has been and never can be fully enforced. Plaintiffs have generally directed their fire toward major governmental actions, but it is only the restraint of private litigants which has prevented such matters as salary increases for elected officials and the

construction of new county courthouses from coming under judicial scrutiny.

The practical difficulties with *Allen* are further demonstrated by the history of this very dispute, which has been litigated in separate district courts by separate parties for the last three years. If Section 5 applies only to registration and voting, then the refusal of the Attorney General or the District Court for the District of Columbia to permit the implementation of a change results simply in the retention of prior procedures. In a case involving redistricting, however, the District of Columbia Court's refusal to permit implementation of a plan, see *Mississippi v. Smith*, 541 F. Supp. 1329 (D.D.C. 1982), appeal dismissed, _____ U.S. _____ __, 103 S. Ct. 1888 (1983), leaves to a different district court in a different case with different litigants the task of fashioning a remedy to replace an apportionment rendered unconstitutional as a result of a new census. The litigants in one case are to a large extent victimized by the decisions of the litigants in the other case. For instance, the Republican Appellants, who were made defendants in this proceeding, were not and could not have been parties in *Mississippi v. Smith*, and could not pursue the appeal which could long since have resolved this dispute. Congress could not have rationally designed such a bizarre system for resolving redistricting disputes. In fact, Congress did not design it; it is simply a makeshift contraption arising from this Court's mistake in *Allen*.

The original Congressional scheme has been further disrupted to accommodate the *Allen* decision. In *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978), this Court applied the preclearance requirements of Section 5 to a city which is not a political subdivision, a distortion of the plain language of the statute. Such disregard of the law was necessary to effectuate the purposes, not of the Congress which enacted the Voting Rights Act, but of the Court which decided *Allen*. *Id.*, at 138-39 (Blackmun, J., concurring); *id.*, at 139 (Powell, J., concurring in part and concurring in the judgment); *id.*, at 145-46 & n.7 (Stevens, J., dissenting).

Further incongruities may well result from this Court's recent construction of the identical language defining the scope of Section 2. The one clear majority holding of *City of Mobile v. Bolden*, 446 U.S. 55 (1980), is that the original version of Section 2 has the same meaning as the Fifteenth Amendment. Compare 446 U.S. at 60-61 (Opinion of Stewart, J.), with *id.*, at 105 n.2 (Marshall, J., dissenting). Even should this Court accept the argument that the 1982 amendments to Section

2 changed the substantive and evidentiary standards of that provision, the Fifth Circuit has correctly noted that "the amendments did not purport to alter the scope of the right to vote, only the showing required to prove discrimination." *Smith v. Winter*, 717 F.2d 191, 196 n.3 (5th Cir. 1983). A majority of this Court has never authoritatively defined the scope of electoral procedures governed by the Fifteenth Amendment, but a plurality has held that it guarantees nothing more than the right to register and vote free from racial discrimination. *City of Mobile*, 446 U.S. at 65-66 (Opinion of Stewart, J.). The Republican Appellants believe that to be the proper statement of Fifteenth Amendment law, and further believe that it controls the unamended introductory phrase of Section 2, defining the sorts of procedures to which that statutory provision applies. A narrow reading of the scope of Section 2, based upon a narrow reading of the Fifteenth Amendment, should lead to the same reading of the identical language in Section 5, and thus to the overruling of *Allen*. This Court has recently shown itself willing to reconsider earlier statutory constructions undermined *sub silentio* by later decisions. See *Guardians Association v. Civil Service Commission*, _____ U.S. _____, 103 S. Ct. 3221 (1983).

Fifteen years' experience with the Voting Rights Act and the Fifteenth Amendment have demonstrated that *Allen* has been erroneous in its conception and disruptive in its application. Where this Court's construction of another civil rights statute had led to similar incongruities, this Court did not hesitate to overrule its previous decision. *Monell v. Department of Social Services*, 436 U.S. 658, (1978), overruling *Monroe v. Pape*, 365 U.S. 167 (1961). As in *Monell*, Congressional acquiescence in this case does not amount to ratification of the decision. This Court has made plain that the law can be changed only by action of both Houses of Congress and the President. *Immigration and Naturalization Service v. Chadha*, _____ U.S. _____, 103 S.Ct. 2764 (1983). Congressional acquiescence in an erroneous court decision can no more change the law than Congressional rejection of executive action.

In any event, there is no evidence that Congress has acquiesced in *Allen*. Contrary to this Court's belief in *Sheffield*, 435 U.S. at 134-35, Congress has never reenacted Section 5. Only once has it been in order for the full House of Representatives to review the scope of electoral decisions made subject to Section 5, and on that occasion the House voted to repeal Section 5 altogether. 115 Cong. Rec. 38535-36 (1969). The failure of the Senate to concur in this repeal can hardly be taken as a ratification of *Allen*, especially since no such ratification has ever

been presented to the President for his signature. The Voting Rights Amendments of 1975 and 1982, as reported from the House Judiciary Committee, did not address the scope of Section 5, rendering any floor amendment on that subject out of order as non-germane. Since neither the House nor the President has ever had the opportunity to address the *Allen* decision, it is still appropriate for this Court to reexamine the intent of the 89th Congress which adopted Section 5.

Even if this Court reaffirms *Allen*, it is not necessary that Section 2 be given the same broad scope. As Professor Blumstein argues in *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 709 (1983), such a reading could have dire practical consequences:

> It is one thing to extend administrative oversight in suspect jurisdictions to any activity that might have an adverse effect on black political power. ... It is quite something else, however, to extend the coverage of revised section 2 to such a broad scope of government policies. Section 2 could invite virtually unconstrained judicial tinkering with governmental conduct only tangentially related to race or voting.

Blumstein argues, and the Republican Appellants agree, that Congress intended no such broad sweep for the amended version of Section 2:

> The statement in the legislative history that the effect standard of section 5 is distinct from the result standard of section 2 supports the position that the threshold language of section 2 should be construed more narrowly. ... Section 2 (b) of the Voting Rights Act reemphasizes the access orientation of section 2 by stressing the openness of the political process to minorities. This suggests that the threshold language for coverage under section 2 should apply only to access, not outcome, matters. ... As a matter of statutory construction, such a ruling at the outset would reduce the risk that section 2 would be construed as creating a race-based entitlement to representation.

Id. That risk is dramatically underlined by the District Court's remedial order in this case. This Court should eliminate that risk by construing Section 2 consistently with the Fifteenth Amendment and applying it only to governmental actions relating to registration and voting.

II. NEITHER THE AMENDMENT TO SECTION 2 NOR ANY OTHER PORTION OF THE VOTING RIGHTS AMENDMENTS OF 1982 HAS ANY BEARING UPON LITIGATION UNDER SECTION 5.

The Plaintiffs began this case as an effort to enjoin enforcement of a statute to which the Attorney General had objected under Section 5. Section 2 was first brought into this case, not by the Plaintiffs, but by this Court's order that the District Court consider whether the 1982 amendment to that Section would have any effect on this Section 5 proceeding. As the Republican Appellants argued in their Pretrial Brief, both the language and the history of the statute make plain that it does not.

The notion that the Voting Rights Amendments of 1982 somehow changed the law regarding Section 5 is rather remarkable, both at first glance and upon further reflection. At first glance, it is apparent that the amendments make no mention whatsoever of Section 5. See Pub. L. 97-205, 96 Stat. 131 (1982). The Republican Defendants know of no authority for amending a statute by indirection.

The legislative history fully supports the conclusion, apparent from the face of the statute, that Section 2 has no bearing in Section 5 cases. The committee reports in both Houses repeatedly rejected efforts to change Section 5 in any respect. See, e.g., H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 33-35 (1981) [hereinafter cited as House Report]; S. Rep. No. 417, 97th Cong., 2d Sess., 14-15 (1982) [hereinafter cited as Senate Report]. In the face of these repeated declarations, the entire argument to the contrary arises from a single footnote in the Senate Report, *supra*, at 12 n.31, and from brief floor remarks by Senator Kennedy after all amendments to Section 2 had already been repulsed. 128 Cong. Rec. S7095 (daily ed. June 18, 1982).

Chairman Edwards immediately contradicted the Kennedy position in response to questions from Representatives Levitas and Fowler of Georgia. Georgia was in the process of seeking approval under Section 5 for the lines drawn for the two Representatives' adjacent districts. See *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem., _____ U.S. _____, 103 S. Ct. 809 (1983). Edwards told Levitas, "No change was made" in Section 5 preclearance. 128 Cong. Rec. H3844 (daily ed. June 23, 1983). Edwards further agreed with Fowler's statement that "any pending litigation throughout the land that is under

a section 5 challenge and actively being considered by Federal courts could not be affected in any way, shape or form, by the adoption of the amendments and the ultimate passage of this act." *Id.*, at H3845. This very case was being actively considered at the time Chairman Edwards made his statement, and the District Court was wrong to conclude that its Judgment should be affected in any way by the ultimate passage of the 1982 amendments.

The chief reason that the amendment to Section 2 could have no effect on Section 5 proceedings is that no one in either House except Senator Kennedy ever suggested that the substantive standard of Section 2 was more stringent than that of Section 5. While Edwards and Representative Sensenbrenner chose to read Kennedy's view into the record when the bill returned to the House, *id.*, at H3841, their own remarks, both before and after that exercise in regurgitation, expressly contradicted the Kennedy position. The record is clear that the House proponents of the measure thought that Section 2 embodied the effects test of Section 5. The Republican Appellants will argue that the Senate relaxed that standard, but it is sufficient to resolve this appeal that the Senate did not strengthen it. The House Report expressly equated the two standards. House Report, *supra*, at 28. Chairman Rodino and Representative Sensenbrenner said the same thing. 127 Cong. Rec. H1383 (daily ed. Apr. 7, 1981) (remarks of Rep. Rodino); *id.*, at H6983 (daily ed. Oct. 5, 1981) (remarks of Rep. Sensenbrenner); *id.*, at H6985 (remarks of Rep. Rodino). The Senate Democratic leadership made plain that they believed Section 2 to embody the effects test. 128 Cong. Rec. S7138 (daily ed. June 18, 1982) (remarks of Sen. Byrd); *id.*, at S7111 (remarks of Sen. Cranston); *id.*, at S7115 (remarks of Sen. Biden). The Committee Report drew a distinction between the two standards, but strongly implied that Section 2 is less stringent. Senate Report, *supra*, at 68 & n.224. Private advocates of the legislation said the same thing. Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d. Sess. 795-801 (1982) [hereinafter cited as Senate Hearings] (testimony of Armand Derfner). Only Senator Kennedy suggested that an electoral scheme which did not violate Section 5 could possibly violate Section 2. Given his demonstrated inability to explain his own bill, *id.*, at 217, his single floor statement at the close of debate should not be held to outweigh the overwhelming testimony of both Houses.

If the Section 2 standard is not more stringent than Section 5, then

the District Court was wrong to conclude that its 1982 plan, which had been designed in compliance with Section 5, constituted a violation of Section 2. The 1982 plan being perfectly consistent with both Section 2 and Section 5, the District Court's most recent Judgment should be reversed, and its 1982 Order reinstated.

III. SECTION 2 PROHIBITS ONLY THOSE ELECTORAL SCHEMES INTENTIONALLY DESIGNED OR MAINTAINED TO DISCRIMINATE ON THE BASIS OF RACE.

This Court need not determine whether or not Section 2 applies to redistricting decisions if it agrees with the Republican Appellants that, wherever Section 2 applies, it prohibits only intentional racial discrimination.[5] The language of the statute, applicable rules of construction, and the legislative history demonstrate that, while Congress meant the courts to construe circumstantial evidence of intent generously in favor of the Plaintiffs, it did not intend to alter the usual constitutional standard requiring a demonstration of intent.

These points were thoroughly briefed by the Republican Appellants in their Pretrial Brief in the District Court. While the District Court filed no opinion specifying its construction of Section 2, it necessarily rejected these arguments in granting relief to the Plaintiffs. The Plaintiffs neither alleged nor proved discriminatory intent connected with the design or maintenance of the Court's 1982 plan. In finding that its own 1982 plan ran afoul of Section 2, the District Court necessarily concluded that a finding of intent was unnecessary.

A. Plain Meaning

Ordinarily the meaning of statutes ought to be determined by an examination of their precise terms. It is not necessary to examine the legislative history of the statute if a plain meaning can be determined from its face. *Maine v. Thiboutot*, 448 U.S. 1,6 n.4 (1980), quoting

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[5] In their Memorandum in Opposition to Application for Stay, at 6, the Brooks Plaintiffs claim that the Republican Appellants do not contest the District Court's finding that its 1982 plan discriminates against blacks within the meaning of newly amended Section 2. This claim is false. Appellants assert that the District Court misconstrued the meaning of Section 2. Measured against a proper construction, or any other intelligible construction, of that statute, the 1982 plan did not discriminate against anyone.

TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

If Congress intended to obviate the perceived need for a showing of intent, the language of Section 2(a) seems an odd way to do it. As amended in 1982, Section 2(a) simply eliminates the phrase "to deny or abridge" from the prior Section 2 and inserts the phrase "in a manner which results in a denial or abridgement of". If Congress had wished clearly to preclude the use of an intent test, it could easily have used the "effect" language found in Section 5.

The use of new and untested language in Section 2(a) would render its meaning entirely obscure had Congress not qualified it "as provided in subsection (b)." Examined linguistically, the first sentence of subsection (b) might be as confusing as subsection (a), but this language in fact had a history at the time of its adoption and now has an established meaning. It is drawn almost word for word from this Court's opinion in *White v. Regester*, 412 U.S. 755, 765-66 (1973), which stated, with regard to a charge that a particular electoral system was discriminatory:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Two days after President Reagan signed the Voting Rights Amendments of 1982, this Court finally clearly established that plaintiffs challenging electoral schemes as racially discriminatory must prove invidious intent on the part of those responsible for establishing or maintaining the system. Citing, although not quoting, the passage in *White* which had just been incorporated into the amended version of Section 2, the Court said:

> The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial ... discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population. *Whitcomb v. Chavis*, *supra*, at 149. See also *White v. Regester*, *supra*, at 765. Cases charging that multimember districts unconstitutionally dilute the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection Clause cases. *Washington*

> *v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), made it clear that in order for the Equal Protection Clause to be violated, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, *supra*, at 240.

Rogers v. Lodge, 458 U.S. 613, 617 (1982).

After the decision in *Rogers*, there can no longer be any doubt that this Court regards the *White* holding as incorporating its well-established rule that claims of racial discrimination under the Equal Protection Clause of the Fourteenth Amendment must be supported by proof of invidiously discriminatory intent. This is an authoritative interpretation of the language chosen by Congress for incorporation in Section 2(b), and it is fully consistent with the language of Section 2(a). Having fully explained the language of the statute now before the Court, this Court must necessarily hold that a finding of discriminatory intent is a prerequisite to the establishment of a Section 2 violation.

B. Rules of Construction

1. Rule of Lenity in Penal Statutes

It is generally forgotten that the Voting Rights Act contains criminal sanctions. Indeed, the Fifth Circuit forgot that fact, rejecting a constitutional attack based upon the vagueness of Section 2 on the grounds that a civil statute need not speak with the precision required of penal statutes. *Jones v. City of Lubbock*, No. 83-1196, slip op. at 2687 (5th Cir. Mar. 5, 1984), petition for rehearing en banc filed (Mar. 19, 1984). Nevertheless, Section 12(a) provides, "Whoever shall deprive or attempt to deprive any person of any right secured by section 2 ... shall be fined not more than $5,000, or imprisoned not more than five years, or both." 42 U.S.C. §1973j(a) (1976). It defies the imagination to suppose that anyone could be imprisoned for running afoul of the several pages of relevant factors set out by the Senate Report in its description of Section 2. See Senate Report, *supra*, at 204-08. Any effort so to apply the results test would almost certainly be ruled void for vagueness. See *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Whatever justification may exist for this imprecision in a civil context disappears in a criminal case. Persons charged with a crime have the right to know with some specificity what actions are forbidden by

law.* It can hardly be argued that the Senate Report and other statements by the more ardent proponents of the 1982 amendment specify the acts prohibited by Section 2 with any sort of precision. Section 2 must therefore be construed in light of the general rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971).

It may be argued that the rule of lenity has no application to Section 2 when applied in a civil context. It is possible to construe Section 2 broadly and vaguely in civil cases while giving it a very strict reading in criminal cases brought under Section 12(a). However, this Court has not chosen such a bifurcated approach to similar statutory arrangements. The Court has held that in a civil case brought under the False Claims Act, 31 U.S.C. §231 (1976), "we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." *United States v. McNinch*, 356 U.S. 595, 598 (1958).

The leading treatise on statutory construction provides the folowing rule where, as here, a statute is both penal and remedial: "Probably the best position is that the statute should be construed to apply alike to the same operative facts in both civil and criminal cases." 3 J. Sutherland, *Statutes and Statutory Construction* §60.04 at 35 (4th ed. C. Sands 1974). Indeed, this Court has applied the rule of lenity to statutes that are clearly remedial. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (Clean Air Act).

It is possible to reconcile Section 2 and Section 12(a) only by retaining the necessity of proof of discriminatory intent. The burden of proof may shift depending on the nature of the proceeding, but the

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* The Fifth Circuit takes the bizarre position that government officials do not need fair warning because Section 2 does not regulate conduct. *City of Lubbock*, slip op. at 2687. After stating that Section 2 does not "regulate the conduct of municipal elections," *id.*, the Court proceeded to order the City to change the way its elections are conducted. *Id.*, at 2703-04. Indeed, a member of that panel admitted in a related case that "we are yet to give the district courts adequate guidance in the application of the amended Voting Rights Act, for we have not yet fully defined 'discrimination' as the term is used in voting rights cases." *City of Abilene*, slip op. at 2294 (Higginbotham, J., concurring). If the district courts lack guidance, the public officials who are subject to imprisonment for violating Section 2 must be absolutely baffled.

operative facts giving rise to judicial relief must remain the same. It cannot reasonably be argued that any person is given fair notice by the terms of the statute or by its legislative history of what specific acts have been forbidden. Only by construing the statute to require a showing of discriminatory intent may fair notice be given.

2. Avoiding Constitutional Questions

Whereas the rule of lenity applies only where there is a patent ambiguity in the statute, courts will attempt to avoid the necessity of deciding constitutional questions at the outset by adopting any reasonable construction of the statute which avoids those questions. "Where the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); accord, *Lorillard v. Pons*, 434 U.S. 575, 577 (1975). Thus, this principle of construction comes into effect, not after every effort to ascertain Congressional intent has been exhausted, but as soon as a serious constitutional question has been raised. The Court will adopt a restrictive construction "when the statute provides a fair alternative construction." *Lewis v. United States*, 445 U.S. 55, 65 (1980).

In so doing, the Court will not ignore the clearly expressed intent of Congress. However, the Court will not adopt a construction raising constitutional issues unless Congress has clearly stated its intention. The Court has said that where an asserted construction of an act "would give rise to serious constitutional questions," then "we must first identify 'the affirmative intention of the Congress clearly expressed'" before accepting that construction. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 501, (1979) quoting *Benz v. Compania Naveria Hidalgo*, 353 U.S. 138, 147 (1957).

Certainly, if Congress had wished to eliminate the consideration of discriminatory intent, thereby departing from constitutional precedent under the Fourteenth and Fifteenth Amendments, it could have said so in no uncertain terms. Among all of the explanatory sentences inserted in Section 2(b), it would have presented no difficulty to have said, "Proof of discriminatory intent shall not be required under this Section." No such sentence appears.

In a case involving this very statute, this Court has recently said "that normally this Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia*

County v. McMillan, ____ U.S. ____, 52 U.S.L.W. 4397, 4398 (U.S. Mar. 27, 1984). As will be argued in Point IV below, substantial doubt exists about the constitutional authority of Congress to prohibit electoral schemes not otherwise prohibited by the Fifteenth Amendment. To avoid the necessity of resolving that constitutional question, this Court should conclude that Section 2 does not prohibit electoral procedures which are consistent with the Constitution.

3. Presumption of Stability in Federal-State Relations

The third, and perhaps the most important rule of statutory construction is that courts will not lightly assume that Congress meant to alter the existing relationship between the States and the federal government. The clearest statement of this rule was delivered for the Court by Justice Marshall in *United States v. Bass*: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). While *Bass* was a criminal case, the rule has also been extensively applied in a civil context. See generally *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959).

Judge Wald has noted the current prominence of this rule of construction in this Court's jurisprudence: "Last Term the most popular presumption was that Congress did not intend to interfere with the traditional power and authority of the states unless it signaled its intention in neon lights." Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 208 (1983). As an examination of the legislative history will show, Congress certainly did not express in neon lights that it wished the courts to engage in open-ended reconstruction of state and local governments.

C. Legislative History

The District Court in this case gave no reasons for its decision, so it is impossible to tell the extent to which an erroneous view of the legislative history may have influenced the Court's judgment. However, other lower courts have persistently made the mistake of construing the legislative history instead of the statute itself. *City of Lubbock*, slip op. at 2694-96, 2700-02; *City of Abilene*, slip op. at 2294; *Gingles*, slip op. at 12-22; *Chapman v. Nicholson*, No. CV82-PT-1879-J, slip op. at 5-8 (N.D. Ala. Feb. 13, 1984). These decisions are consistent neither with each other nor with the totality of the legislative history.

The chief mistake made by the lower courts is to regard legislative history as a first resort rather than a last. This Court "now shifts onto the legislative history the burden of proving that the words do not mean

what they appear to say." Wald, *supra*, at 198. The Court has expressed caution in relying upon legislative history. As Justice Douglas wrote for the Court:

> In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws. ...
>
> The reason is the *caveat* of Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means."

S & E Contractors, Inc., v. United States, 406 U.S. 1, 13-14 n.9 (197. (citations omitted). Indeed, the Court on occasion has even further limited the relevance of legislative history. "[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). In analyzing legislative history, the Court does not simply apply mechanistic rules to determine whose view of a disputed piece of legislation should prevail. Rather, the Court has said that it must consider "the oft-quoted factors enunciated in *Skidmore v. Swift & Co.*, 322 U.S. 134, 140 (1944)." 447 U.S. at 120. Those factors, although originally applied to the evaluation of administrative judgments, have equally been applied to interpretation of a legislative judgment.

While it is apparent that Section 2 was not the primary issue during House consideration of the Voting Rights Amendments, the citations to the legislative history in Point II above demonstrate that the bill's managers believed they had simply incorporated the effects test from Section 5. When the Senate hearings began to focus on this issue, none of the bill's proponents could explain it. Senators Kennedy and Mathias, the chief Senate sponsors, were completely unable to explain the effect of the amendment to Section 2 at the opening of the hearings. Senate Hearings, *supra*, at 200-03, 217. Even the civil rights leaders appearings at the first day of the hearings, Benjamin Hooks and Vilma Martinez, were unable to explain the substantive standard set up by the new Section 2, and Martinez explicitly equated the effects test with the results test. *Id.*, at 252-53, 305. It was not until the fourth day of hearings that advocates began to distinguish explicitly between Section 2 and Section 5. *Id.*, at 795-801 (testimony of Armand Derfner).

The shift in position on the meaning of Section 2 represented an attempt to overcome President Reagan's stated opposition to the amend-

ment. Statement of the President, 17 Weekly Comp. Pres. Doc. 1223 (Nov. 6, 1981). The President's allies in the Senate stressed their concern over Section 5 cases which had been relied upon in the House and explicity required construction of electoral districts so as to approximate proportional representation. *City of Richmond v. United States*, 422 U.S. 358, 370 (1975), cited in House Report, *supra*, at 45 n.1; *City of Port Arthur v. United States.*, 517 F. Supp. 987 (D.D.C. 1981), aff'd _____ U.S. _____, 103 S. Ct. 530 (1982), cited in Senate Hearings, *supra*, App. at 35. As a result, the Subcommittee deleted the amendment to Section 2, and the full Committee found itself in deadlock over the issue. See Senate Hearings, *supra*, App. at 68-69 (remarks of Sen. Biden). The deadlock was broken by an agreement with the President, *id.*, App. at 58-59 (remarks of Sen. Dole), to add Section 2(b) to the House version, incorporating language taken directly from this Court's opinion in *White v. Regester*. *Id.*, App. at 60 (remarks of Sen. Dole); *id.*, App. at 63 (remarks of Sen. DeConcini); *id.*, App. at 68 (remarks of Sen. Simpson); *id.*, App. at 100 (remarks of Sen. Kennedy). Senator Dole in announcing the compromise, and President Reagan in signing it, made clear that their agreement rejected any theory of law that would tend toward a racial entitlement to proportional representation. *Id.*, App. at 60 (remarks of Sen. Dole); Remarks on Signing H.R. 3112 into Law, 18 Weekly Comp. Pres. Doc. 846 (June 29, 1982).[7]

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[7] President Reagan's view of the meaning of the compromise is, of course, at least as important as that of the drafters of the Senate Report. See *Immigration v. Naturalization Service v. Chadha*. Nevertheless, the lower courts have consistently misconstrued this compromise as a total victory for the original sponsors of the Senate bill, neglecting the centrality of Senator Dole's efforts to allay the fears of President Reagan and of many Senators that courts might construct plans so as to guarantee the election of minorities. The *Gingles* court acknowledged that a system which did not elect a proportional number of blacks is not illegal on its face, but added, "This we consider to be the limit of the intended meaning of the disclaimer in amended Section 2." Slip op. at 17 n.13. Contra, Subcomm. on the Constitution of the Senate Comm. on the Judiciary, Report on the Voting Rights Act, Comm. Print, 97th Cong., 2d Sess. 83 (1982) (additional views of Sen. DeConcini and Sen. Leahy) ("The minority joins the majority in rejecting proportional representation as either an appropriate standard for complying with the Act or as a proper method of remedying adjudicated violations."). Compare *City of Lubbock*, slip op. at 2700 ("Even under the best of circumstances, at-large districts tend to debase the value of a minority's political strength."), with Senate Hearings, *supra*, App. at 63 (remarks

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The text of Section 2 was set in concrete at the moment the President agreed to it. Nothing that happened thereafter had any bearing on the outcome of the legislation. The antagonists stopped trying to influence Members of Congress, and started trying to influence the judges who would interpret the compromise already agreed upon. The Senate Committee Report stands as the foremost example of the attempt to create a legislative record after the fact. Expressing the hopes of one party to the compromise, it paid no more than lip service to *White v. Regester*, and instead went on to endorse evidentiary standards drawn in part from *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd sub nom. *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1975), and in part from the secret desires of its authors. Senate Report, *supra*, at 27-30. The lower courts for the most part have treated this passage of the report as though it had been incorporated into the statute and signed by the President, who, of course, has no authority to veto a committee report. *City of Lubbock*, slip op. at 2694-95; *Gingles*, slip op. at 14-15; *Major*, 574 F. Supp at 350-51.[8] In fact, the Senate Report is entirely inconsistent with the rest of the legislative history. There is no evidence the President ever heard of *Zimmer*, it was never mentioned on the floor of the House or in the House Report, and it was mentioned only once on the floor of the Senate, by Senator DeConcini, who was striving to assure his constituents in

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of Sen. DeConcini) ("I would never support this bill ... if I believed that it would result in an automatic invalidation of the [at-large] electoral system of the Phoenix city government."). The only appeal from a district court which failed automatically to invalidate an at-large form of government resulted in reversal. *City of Abilene*.

[8] The Fifth Circuit is already divided against itself on the meaning of the legislative history. One panel found, not one, but three separate standards applied by the Fifth Circuit prior to this Court's *Mobile* decision, *City of Lubbock*, slip op. at 2691 n.8, and went on to fashion yet a fourth standard out of the Committee Report, *id.*, at 2700-02. Another panel, only three days before, had said, "The factors laid out in the Senate Report for showing a violation of the results test are essentially the same factors as in *Zimmer*." *City of Abilene*, slip op. at 2294. Accord, *Chapman*, slip op. at 4. This hardly constitutes the "extensive, reliable and reassuring track record of court decisions" promised by the Senate Report, *supra*, at 32.

Phoenix that it would have no effect on them. 128 Cong. Rec. S6930-31 (daily ed. June 17, 1982).[9]

During floor debate, Senator Dole provided the only example of "precise analysis of statutory phrases by sponsors," *S & E Contractors*, 406 U.S. at 13-14 n.9, found anywhere in the record. He told Senator Thurmond that the compromise offered minorities no guarantee of election "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting or having their vote counted, or registering, whatever the process may include." 128 Cong. Rec. S6962 (daily ed. June 17, 1982).[10] In an extended colloquy, Senator Gorton asked Dole for his definition of "a denial or abridgement of the right to vote." Dole responded:

> The political processes leading to nomination or election must be equally open to participation by members of a class of citizens without regard to race, color, or language minority. Accordingly, a denial or abridgment is established where that equality of opportunity to participate is lacking.

Id., at S7120 (daily ed. June 18, 1982). Nothing in Dole's colloquy with Gorton indicates a broader view of the scope of the new language.

Other aspects of the colloquy demonstrate that Dole was obliged to allude to intent to explain his own amendment. Dole said that "the failure to nominate or elect minority candidates may indicate the electoral system *has been designed* to take advantage of racial bloc voting ...." *Id.* (emphasis added). He continued, "The right to vote remains an individual right, but in some cases the denial of their right *may be based* on a class characteristic." *Id.* (emphasis added). Dole's use of

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[9] Apparently Senator DeConcini was relying upon testimony by counsel for the Brooks Plaintiffs, who had denied a point-blank allegation that the case of *Kirksey v. Board of Supervisors*, 554 F.2d. 139 (5th Cir.), cert. denied, 434 U.S. 968 (1977), had led to "a proportional representation result." Senate Hearings, *supra*, at 1182 (testimony of Frank Parker). In fact the "result" of that case was that two blacks were elected to the five-member board of supervisors of a county that is 39% black. Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 521-22 (1981). If that is not the sort of proportional representation forbidden by the proviso to Section 2(b), then words have lost all meaning.

[10] There is no evidence in this case, and the District Court made no findings, that there are any barriers in Mississippi "to keep someone from voting or having their vote counted, or registering."

the passive voice seeks to avoid the question of responsibility for these actions, but the words "designed" and "based" carry an inevitable implication of human volition. It may be that Dole intended his amendment to banish intent from Section 2; it is clear that he failed to do so, even in his own mind.

There are only three areas of agreement which emerge from the debate. First, all Senators agreed that the compromise embodied the test set out in *White*. Second, almost all Senators and certainly the President rejected any use of proportional representation as either a test or a remedy. Third, almost all Senators agreed that the plurality in *City of Mobile* had applied too exacting a standard of proof to the evidence presented in the case. This Court's more generous consideration of "the totality of the circumstances" in *Rogers* accurately embodies the consensus of opinion in Congress. The intent of Congress and the President is encompassed by these three points, and not by the Senate Report, the internal obscurities of which, together with the inability or unwillingness of its purported authors to explain it on the floor, discredit it as a reliable index of the Senate's intent."

IV. SECTION 2, IF CONSTRUED TO PROHIBIT ANYTHING OTHER THAN INTENTIONAL DISCRIMINATION ON THE BASIS OF RACE IN REGISTRATION AND VOTING, EXCEEDS THE POWER VESTED IN CONGRESS BY THE FIFTEENTH AMENDMENT.

" Indeed, this Court has recently rejected the use of a committee report as a means to expand vague statutory language. In *Ruckelshaus v. Sierra Club*, _____ U.S. _____, 103 S. Ct. 3274 (1983), the Court construed §307(f) of the Clean Air Act, 42 U.S.C. §7607(f), which permits a court to award attorney fees "whenever it determines that such an award is appropriate." After finding this language less than instructive, 103 S. Ct. at 3276, the Court quoted from the House Committee Report which stated that a non-prevailing party could collect fees. *Id.*, at 3278. Nevertheless, the Court found this inadequate to support an award of fees to a party that did not prevail even in part. "Instead, we are persuaded that if Congress intended such a novel result -- which would require federal courts to make sensitive, difficult, and ultimately highly subjective determinations -- it would have said so in far plainer language than that employed here." 103 S. Ct. at 3281. That description of the judicial task could apply with equal force to that envisioned by the more ardent proponents of the amendment to Section 2.

If this Court accepts the construction of Section 2 apparently adopted by the District Court, it will have to face the issue of whether Section 2 as construed is unconstitutional. This issue was raised prior to trial by the Defendants in their response to the Plaintiffs' stated objections to the 1982 plan. The Republican Appellants raised it in their Pretrial Brief and again in their post-trial Motion to Amend the Judgment.[12]

This Court has held that Congress enjoys substantial power under the Fifteenth Amendment to legislate remedies for its violation. *South Carolina v. Katzenbach*. In that case the Court upheld the power of Congress to reverse the usual presumption of constitutionality granted to State laws and to require States and localities to prove to the satisfaction of federal officials, before new regulations relating to voting could go into effect, that those regulations would not violate the Fifteenth Amendment. The Court called this "an uncommon exercise of congressional power," but concluded that "exceptional conditions can justify legislative measures not otherwise appropriate." 383 U.S. at 334. The justification accepted by the Court at that time was the extensive record developed before Congress "that some of the States covered by §4(b) of the Act had resorted to the extraordinary strategem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future ... ." *Id.*, at 335 (footnote omitted). In rejecting arguments that the coverage formula was overbroad, the Court found it important that "the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years." *Id.*, at 331.

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[12] The Brooks Plaintiffs, in their Memorandum in Opposition to Stay, at 4, misrepresent the record on this point. On October 26, 1983, all Plaintiffs were served with the Defendants' Answers to objections filed by the Plaintiffs against the 1982 plan, the only pleadings permitted by the District Court on retrial. Those Answers raise the unconstitutionality of Section 2 as an affirmative defense. The Republican Appellants relied on those Answers, as the District Court's order of April 29, 1982, permitted them to do, so long as they felt their interests adequately represented by the State Defendants. It was only after the District Court's 1984 Judgment held out the reasonable expectation of the election of Democrats to Congress from both the Second and Fourth Districts that the State Defendants, all elected Democratic officials, developed a sudden lack of interest in further proceedings. Even before that time, however, these Appellants raised the issue in their Pretrial Brief.

The District Court apparently concluded that Congress in 1982 intended to create new substantive protections not found in the Fifteenth Amendment, but it is quite clear that Congress did not make the slightest effort to identify particular States and localities in need of this extraordinary remedy. The Committee Reports of both Houses admitted that there was no evidence of voting discrimination on a nationwide basis. House Report, *supra*, at 34 n.113; Senate Report, *supra*, at 15.[13] Congress made no effort whatsoever to address the overinclusion problem which this Court had found critical in *South Carolina v. Katzenbach*. Moreover, since the statute is both nationwide and permanent, the possibility of bailout does not exist. See *Fullilove v. Klutznick*, 448 U.S. 448, 546-47 (1980) (Stevens, J., dissenting).

Moreover, the Republican Appellants submit that the Constitutional question is controlled by a prior decision of this Court. In concluding that Section 2 mandated the abandonment of an electoral plan which had not even been alleged to be unconstitutional, the District Court's Judgment necessarily recognized the power of Congress to create constitutional rights where none had previously existed. The Chief Justice and Justice Blackmun joined Justice Stewart's concurring and dissenting opinion in *Oregon v. Mitchell*, which denied that Congress has the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the [Equal Protection] clause, and what state interests are 'compelling.'" 400 U.S. at 296, (Stewart, J., concurring in part and dissenting in part). Indeed, that view commanded the support of a majority of the Court. *Id.* at 130 (opinion

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[13] While the Department of Justice will surely defend the constitutionality of Section 2 on this appeal, the Court should note that the Department expressed grave doubts on that score during Congressional deliberations. Assistant Attorney General Reynolds testified:

> I think that the proposed amendment as it is now written I think could well be questioned on constitutional grounds. I am not sure about that challenge. The concern that one would have from a constitutional standpoint is that a standard is being put in place not unlike the "effect" test in section 5 without the kind of evidentiary basis or record that normally you would expect to be developed to show the need for this departure from the constitutional norm of the 15th amendment.

Senate Hearings, *supra*, at 1703. Attorney General Smith offered similar thoughts. *Id.*, at 73.

of Black, J.); *id.*, at 213 (Harlan, J., concurring in part and dissenting in part).

That view has recently been reiterated by the Chief Justice, joined by Justices Powell, Rehnquist, and O'Connor, who denied "that Congress can define rights wholly independently of our case law." *EEOC v. Wyoming*, _____ U.S. _____, 103 S. Ct. 1054, 1074 (1983) (Burger, C. J., dissenting). That opinion concluded that the Fourteenth Amendment did not give Congress the power to prohibit conduct not in itself unconstitutional in the absence of a finding that some right protected by that Amendment had actually been infringed. *Id.*, at 1073.[14]

There has been no finding by the District Court that any constitutional right of the Plaintiffs has ever been violated, much less one protected by the Fifteenth Amendment. This Court explicitly upheld the constitutionality of Mississippi's Congressional districting scheme in *Connor v. Johnson*. Both the 1972 plan approved by the Attorney General and the 1981 plan were based on that scheme. Neither this Court nor any other court has ever found any one of those plans to violate any right protected by the Constitution. Moreover, none of the Plaintiffs even attempted to prove that the District Court's 1982 plan violated their constitutional rights in any way. Under the circumstances, this Court should conclude that Section 2, as construed by the District Court to mandate the abandonment of a plan which does not violate the Constitution, exceeds the power of Congress.

Nor is it relevant that the Attorney General found the 1981 plan to have offended Section 5. While a District Court is barred from enforcing a plan disapproved by the Attorney General, *McDaniel v. Sanchez*, 452 U.S. 130 (1981), and is empowered to treat his disapproval as a valid finding of illegality for purposes of fashioning relief, *Upham v. Seamon*, this Court has never held that a District Court is required to accept the Attorney General's legal opinion as conclusive. In any event, the Solicitor General has agreed that any violation of Section 5 which may have existed was fully remedied by the District Court's 1982 plan which the Republican Appellants seek here to reinstate. For this reason, the justification found in the Senate Report "that voting practices and

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[14] It was not necessary for the majority to reach the issue of the enforcement power of Congress under the Fourteenth Amendment, because they found the statute permissible under the Commerce Clause. *Id.*, at 1064. Congressional power under the Fourteenth Amendment is similar to that delegated under the Fifteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. at 651.

procedures that have discriminatory results perpetuate the effects of past purposeful discrimination," Senate Report, *supra*, at 40, cannot be used to support the invalidation of the 1982 plan.

Even if there were evidence of past purposeful discrimination involving Mississippi Congressional districting, the results test does not cure it. When a court is already required to devise a remedy which complies with Section 5, what more can Section 2 require? It is difficult to see what more could be demanded than the absence of discriminatory purpose or effect. The only imaginable step beyond the effects test is to require racial gerrymandering to insure the election of a black candidate. "Racial gerrymandering was forbidden by *Gomillion v. Lightfoot*, 364 U.S. 339" (1960), *South Carolina v. Katzenbach*, 383 U.S. at 311, and it has been explicitly forbidden by Congress in Section 2(b) itself. See *City of Port Arthur v. United States*, _____ U.S. _____, 103 S. Ct. 530, 538 (1982) (Powell, J., dissenting). Nevertheless, the remedy imposed by the District Court in this case does exactly that.

It is true, of course, that this Court, albeit by divided majorities, has upheld, under some circumstances, Congressional imposition of an otherwise unconstitutional race-conscious scheme to remedy past discrimination. See, e.g., *Fullilove v. Klutznick*. This Court has rejected charges that those schemes discriminate against whites who might otherwise have obtained the jobs or government contracts at issue. However, the remedy imposed in this case discriminates additionally and primarily against blacks. If it is appropriate to remedy past violations of the Fifteenth Amendment, whatever those may be, by packing black voters into a particular Congressional district, then the District Court has chosen to aid blacks in one district by harming blacks, no less deserving of remedial attention, in four others. The plan imposed by the District Court penalizes 359,329 blacks of voting age in four districts so that 170,491 blacks may gain political ascendancy over 152,228 whites in the Second District. See p. 33a, *infra*. Thus, the plan hurts more blacks than it helps, and it hurts more blacks than whites. A less appropriate remedy can hardly be imagined.[15]

The other justification advanced by the Senate Report is "that the

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[15] This Court should understand that the Republican Appellants are not arguing that the District Court abused its remedial discretion. They are aware that this Court has permitted district courts broad latitude where a violation has been demonstrated. Cf. *Karcher v. Daggett*, No. A-740, 52 U.S.L.W. 3717 (U.S.

(Continued on pg. 27)

difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudiciation create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected, and undeterred unless the results test proposed for Section 2 is adopted." Senate Report, *supra*, at 40. No case has ever held that Congress may prohibit practices which are not unconstitutional simply because it may be too difficult for plaintiffs to prove the presence of unconstitutional government action. Even if such power may exist, it has no logical application in a judicial proceeding which is not even based on Section 2 in the first place. Where, as here, a court faced with a one-man-one-vote case must fashion a remedy, there simply is no "substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected, and undeterred." There was no evidence whatsoever before Congress that federal courts in their remedial orders surreptitiously discriminate on the basis of race. This purported justification makes sense, if at all, only insofar as it relates to the proof of a violation; it has no application at all in a remedial context.

The real facts on this record are plain. A group of politicians simply decided that the Constitution rendered it inconveniently difficult for them to win lawsuits and elections against other politicians and that Congress should be pressured into amending the Constitution by statute. It is not the first time that Congress has attempted to amend the Constitution by statute simply because it seemed like a good idea. An earlier attempt to do so was struck down by the Supreme Court in *Oregon v. Mitchell*. Justice Harlan's description in that case of the attitude of Congress seems fairly applicable here as well: "[A]ll the evidence indicates that Congress -- led on by recent decisions of this Court -- thought simply that 18-year-olds were fairly entitled to the vote and that Congress could give it to them by legislation." 400 U.S. at 213 (Harlan, J., concurring in part and dissenting in part). Now, as then, this Court must firmly reject any such effort.

(Continued from pg. 26)

Mar. 30, 1984) (Stevens, J., concurring). Rather, they point out the absurdity of this remedy to emphasize the fundamental incoherence of the District Court's understanding of the substantive right at issue. The Fifteenth Amendment does not authorize Congress to impose counterproductive remedies for violations of indefinable statutory rights.

CONCLUSION

For the reasons stated above, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

*MICHAEL B. WALLACE

JONES, MOCKBEE & BASS
1080 Flynt Drive
Suite E
P. O. Box 55507
Jackson, Mississippi 39216
Tel. (601) 939-3895

Attorneys for Appellants

Counsel of Record

APPENDIX

APPENDIX A

District Court Decision and Order

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC 82-80-WK-O

DAVID JORDAN and SAMMIE CHESTNUT, On Behalf of the Greenwood Voters Leage, Individually and on Behalf of others similarly situated,

v.

Plaintiffs

WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

v.

Plaintiffs

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

(June 8, 1982)

Before CLARK, Circuit Judge, and KEADY and SENTER, District Judges.

PER CURIAM:

Plaintiffs bring class actions on behalf of Mississippi residents and registered voters and the state's black residents and voters to (1) enjoin enforcement of the state's 1981 congressional redistricting plan until it is precleared under § 5 of the Voting Rights Act (42 USC § 1973c); (2) prohibit further use of Miss. Code Ann. § 23-5-223 (1972), the state's existing congressional plan, because of population malapportionment allegedly violative of Art. 1, § 2 and the fourteenth amendment to the United States Constitution; and (3) secure a court-ordered plan for the 1982 elections for members of the United States House of Representatives, and thereafter until changed by law. Defendants are the state's governor, attorney general, secretary of state, state board of election commissioners and the Republican and Democratic state executive committees which are responsible for conducting the primary and general elections for the United States House of Representatives in Mississippi.

The court has jurisdiction pursuant to 28 USC §§ 1331 and 1343 and 42 USC § 1973j(f), and a three-judge district court has been properly convened pursuant to 28 USC § 2284.

In August 1981 the Mississippi Legislature enacted S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, for redistricting the state's five congressional districts and thereafter submitted it to the Attorney General of the United States for § 5 preclearance. After requesting additional information, the Attorney General interposed timely objection on March 30, 1982. Although the state legislature was in session when the objection was received, it adjourned several days later

without enacting another plan or further attempting to obtain preclearance from the Attorney General. Instead, on April 7, the state filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance of S. B. 2001. Mississippi v. Smith, No. 82-0956. This court has been notified that the declaratory judgment action, in which plaintiffs have intervened, will not be heard until mid-July. Since by Mississippi law, the 1982 congressional primaries were set for June 1 with runoff primary June 22, this court on April 26 found it necessary to order indefinite postponement of the current year's congressional primary pending expedited hearing on issues relevant to formulation of an interim court-ordered plan.

The parties are in agreement that the present circumstances require the court to adopt an interim redistricting plan effective until S. B. 2001 is precleared or an alternate plan is enacted by the state legislature and precleared under § 5. Admittedly, Mississippi is a covered jurisdiction under § 5 of the Voting Rights Act, and S. B. 2001 is a change in standards, practices or procedures with respect to voting within the meaning of § 5. The parties, however, vigorously disagree on what plan should be adopted by the court as an interim congressional redistricting plan.

During a two-day hearing on May 13 and 14, the court received stipulations, oral and documentary evidence and heard oral argument. Briefs of all concerned parties having been filed, we incorporate herein findings of fact and conclusions of law required by Rule 52(a), F. R. Civ. P.

I.

According to the 1980 official census, Mississippi has a total population of 2,520,638, of which approximately 35% are black. Since the state elects five members of the United States House of Representatives, the norm, or ideal population size for a congressional district is 504,-

128. Because of notable population shifts that have occurred throughout the state since 1970, the districts formed by the existing 1972 plan have a total population variance of 17.6%. The following table reflects the 1980 population, existing extent and percent of deviation, and percentage of minorities in the five 1972 districts:

Dist. No.	Total Pop.	Deviation	% Deviation	Black %
1	495,709	8,419	−1.67	29.90
2	460,780	43,348	−8.60	45.25
3	514,218	10,090	+2.00	37.87
4	500,329	3,799	−0.75	45.37
5	549,602	45,474	+9.02	19.78

In recognition of this disparity, the legislature in 1980 established a joint Senate-House Committee for Congressional Redistricting (Joint Committee), chaired by Representative Thomas H. Campbell, III, which converted census population data into the state's election precincts, conducted eight public hearings around the state and received the views and proposals of interested groups and individuals. Included among the submitted proposals were a number of plans advocated by legislators and citizens of both races. The plans submitted by blacks proposed joining the black majority counties in the northwest portion of the state known as the "Delta area" to other territory to create a black majority district, ranging from 52.1% to 65.81%.[1]

---

[1] The Mississippi Delta consists of 19 Delta and part-Delta contiguous counties as follows: Bolivar, Carroll, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Leflore, Panola, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tunica, Warren, Washington, and Yazoo. This is a distinct geographical area of the state traditionally featuring an agricultural economy concerned with flood control of the Mississippi River. The geography of the Delta has been colorfully and somewhat accurately described as "beginning in the lobby of the Peabody Hotel at Memphis, Tennessee, and ending at Catfish Row in Vicksburg, Mississippi." Since early times, concentrations of blacks have resided in the Delta area. In fact, of the 21 black majority counties in Mississippi, 14 are located in the Delta.

The Joint Committee recognized that the population variances had to be eliminated, but a majority of its members concluded this could be satisfactorally accomplished without diluting black voting strength by rearranging district lines to avoid incumbent congressmen from running against each other and by transferring only six counties and portions of four counties across district lines. Although Mississippi's congressional districting plans from 1882 to 1966 had contained a district encompassing most of the Delta counties, the committee did not feel obligated to voluntarily create a black majority district with a configuration different from the 1972 lines that had been previously precleared.[2]

The record further reflects that the Joint Committee disapproved any major change of the district lines and recommended a plan, the essence of which was enacted by the legislature as S. B. 20001 [sic], which achieved a population variance of .0422 by splitting four counties into adjacent districts (K-27). The stipulated data as to the total population, deviation, percentage of deviation, and percentage of total minority population[3] in the S. B. 2001 districts follow:

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[2] In 1966, the legislature first adopted a plan dividing the north and north-central portions of the state by drawing east/west lines generally across the state which segmented black majority Delta counties into three districts. Civil rights plaintiffs' challenge of the plan as a racial gerrymander violative of the fifteenth amendment was turned down in Connor v. Johnson, 279 F. Supp. 619 (S.D. Miss. 1966), aff'd. 386 US 483, 18 L Ed 2d 224 (1967). The 1966 plan was in fact never submitted and precleared in accordance with § 5. In 1972, the legislature substantially reenacted the 1966 plan, adjusting only for population variances. On May 10, 1972, the Attorney General precleared the 1972 act, which was utilized without challenge for five congressional elections.

[3] Black voting age population is approximately 5% lower than total population figures.

District	Total Population	Deviation	% Deviation	Black %
1	504,107	− 21	−.0042	29.79
2	504,024	−104	−.0206	47.95
3	504,237	+109	+.0216	33.38
4	504,123	− 5	−.0010	45.32
5	504,147	+ 19	+.0038	19.54

S. B. 2001 was objected to by the Attorney General on the ground it divided the black majority Delta and part-Delta counties among Districts 1, 2 and 3 rather than concentrating them in a single district and concluded there had been unlawful dilution of minority voting strength.[4] The Attorney General was of the view that the legislature's reliance upon the 1972 precleared plan was misplaced, and stated that while no objection to the 1972 plan was timely interposed, this was the result of an erroneous determination by his office that the Supreme Court's summary affirmance in Connor v. Johnson, 386 US 483, 18 L ed 2d 224 (1967), was entitled to deference as to the § 5 issues.

[4] The Attorney General's objection letter stated in part:

> Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2 and 3 of the reapportionment plan have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.
>
> Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.
>
> Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, therefore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

Since it is apparent that the population deviations in congressional districts can be easily alleviated, the essence of the dispute centers around claims of dilution of black voting strength. Plaintiffs urge the court to adopt an interim plan with one district containing approximately 65% black majority population. To achieve this purpose, they have submitted two proposals, both of which were devised by Senator Henry J. Kirksey, a black legislator. The primary Kirksey plan (K-30) has a 64.37% black majority district and a total population variance of .2150%. This plan splits five counties, including populous Hinds County, from which a portion of the City of Jackson is combined with 14 Delta and part-Delta counties or segments thereof and with additional counties to form the black majority district. The following table presents the data concerning this plan.

District	Total Population	Deviation	% Deviation	% Blacks
1	504,219	+ 92	+.0182	25.60
2	503,436	−691	−.1371	64.37
3	504,530	+403	+.0799	32.49
4	504,035	− 92	−.0182	33.83
5	504,418	+291	+.0577	19.75

The "fall-back" Kirksey plan (P. Ex. 15) urged by plaintiffs has a 65.81% black majority district and a total population variance of .230%; it splits five counties, including Hinds County, which is divided among three districts. The majority black district in this plan combines portions of the Cities of Jackson and Vicksburg with 15 Delta and part-Delta counties, or segments thereof. Pertinent data on the plan follow:

District	Total Population	Deviation	% Deviation	Black %
1	503,642	−486	−.096	25.72
2	504,926	+798	+.158	65.81
3	503,762	−366	−.072	30.36
4	504,261	+133	+.026	33.70
5	504,047	− 81	−.016	20.33

In addition to the two Kirksey plans, the Joint Committee had before it many other plans submitted by various legislators and citizens, including several plans developed by the committee staff on motion of Representative James C. Simpson, which resulted in a plan referred to as the "Simpson amendment" (K-26). This plan, urged by AFL-CIO, as amicus curiae, has a total deviation of .2141%, and contains a district (District 2) which combines 15 Delta and part-Delta counties with six eastern rural counties to produce a 53.77% black majority district. Another district (District 4) has a 45.25% black district. The Simpson amendment only splits two rural counties and received considerable support in a floor vote occuring in the state House of Representatives. Miss. House Journal, Extraordinary Sess. 1981, p. 30. This plan is depicted below.

District	Total Population	Deviation	% Deviation	Black %
1	504,671	+543	+.1077	25.86
2	504,697	+569	+.1128	53.77
3	503,760	−368	−.0729	31.23
4	503,893	−235	−.0466	45.25
5	503,617	−511	−.1013	19.84

Other p. ns considered but rejected by the legislature have not been urged for adoption by this court. The state officials, however, urge implementation as an interim plan of S. B. 2001, the existing 1972 redistricting plan, or a plan to be drawn by the court only slightly modifying either one of the preceding two.

II.

All parties agree that under § 5 and decisional precedent, this court serves only a limited function in congressional redistricting cases. Our task becomes an "unwelcome obligation" to prescribe an interim plan which will be effective merely until a redistricting plan adopted by the state can lawfully be used in its place, i.e., until either the District of Columbia court renders declaratory judgment upholding S. B. 2001 or the Mississippi legislature enacts another redistricting plan which is precleared under § 5. Moreover, notwithstanding a suggestion in McDaniel v. Sanchez, —— US ——, 68 L ed 2d 724, 739 (1981), that a federal district court should fashion its own plan, this court lacks the time, ability, and record basis to independently create a plan which could be implemented with sufficient promptness to allow the orderly conduct of the 1982 congressional primary and general elections. These limitations thus require us to choose from among the several plans urged for adoption in these proceedings. *Cf.* Terrazas v. Clements, —— F. Supp. ——, slip op. at 13-14 (N.D. Tex., March 24, 1982) (three-judge court).

Mississippi is precluded by the expres terms of § 5 from implementing S. B. 2001 so long as it remains unprecleared. *See* Allen v. State Board of Elections, 393 US 544, 22 L ed 2d 1 (1969); Connor v. Waller, 421 US 656, 44 L ed 2d 486 (1975); Dotson v. City of Indianola, 521 F. Supp. 934 (N.D. Miss. 1981) (three-judge court). Section 5, however, does not by its terms prohibit a federal district court from utilizing, on an interim basis, an unprecleared plan. Indeed, it would be a rare case in which a federal court, compelled to devise an interim redistricting plan, would have opportunity to place into effect a plan that had been precleared under § 5. Although circumstances might arise in which a federal court could order, on an interim basis, implementation of an unprecleared legislative plan, we conclude that any action by

this court to so order S. B. 2001 into effect would be an injudicious exercise of our equitable remedial power. We base this view on several factors indisputably present in this case.

When S. B. 2001 was submitted, it was specifically objected to by the Attorney General, who concluded that it violated § 5. Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General. Perkins v. Matthews, 400 US 379, 27 L ed 2d 476 (1971). The proceedings under that Act which the State of Mississippi has instituted in the District Court of the District of Columbia will determine whether S. B. 2001 passes statutory muster for permanent use. It would be both inappropriate and unseemly for us to implement on a temporary basis the plan which those proceedings seek to preclear since we have other plans which will allow us to order temporary redistricting which adequately reconciles state political policy with federal statutory and constitutional standards. For these reasons the court rejects the defendants' suggestion that S. B. 2001 may be used on an interim basis. We expressly refrain from any action which may be viewed as indicating a position on either side of the issues pending in the District Court for the District of Columbia.

As to the existing 1972 congressional plan, the command of Art. 1, § 2 of the United States Constitution is that representatives be chosen "by the People of the several States." That article permits only those population variances among congressional districts that are "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Kirkpatrick v. Preisler, 394 US 526, 531, 22 L ed 2d 519, 525 (1969); Wesberry v. Sanders, 376 US 1, 11 L ed 2d 481 (1964). Under admitted facts, the state's existing plan with a 17.6% population variance renders it grossly malapportioned, and since it is readily apparent that this degree

of malapportionment is not unavoidable, we declare it to be unconstitutional, and plaintiffs are entitled to summary judgment on that issue as a matter of law.[5] Since plans with substantially lower population variances are available for use, implementation of the 1972 plan, even on an interim basis, would be without justification, and defendants' contention that the 1972 plan be used temporarily is not constitutionally permissible.[6] Accordingly, our decision is narrowed to consideration of the two Kirksey plans and the Simpson amendment proposal.

In determining which plan to place into effect as an interim plan, we must "reconcil[e] the requirements of the Constitution with the goals of state political policy." Connor v. Finch, 431 US 407, 414, 52 L ed 2d 465 (1977). Moreover, *McDaniel*, *supra*, compels us to consider § 5 criteria. Thus, any plan adopted by this court as a temporary method of ensuring upcoming elections cannot violate Art. 1, § 2, the fourteenth amendment, or the Voting Rights Act. In particular, such a plan must satisfy the one person, one vote rule and avoid any dilution of minority voting strength. The three plans before us comply with these federal considerations and no tenable argument could otherwise be made. Since federal standards are met, we must now analyze each plan in light of the state's political policies.

We are guided by the Supreme Court's recent decision in Upham v. Seamon, —— US ——, 71 L ed 2d 725 (1982). In *Upham*, the Court clearly held that, in fashioning an interim reapportionment order, a district court

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[5] *See Kirkpatrick*, *supra* (invalidating plan with variance of 5.97%) and Wells v. Rockefeller, 394 US 542, 22 L Ed 2d 535 (1969) (variance of 13.1% invalid).

[6] This is not a case such as *Wells*, *supra*, and Kilgarlin v. Hill, 386 US 120, 17 L ed 2d 771 (1967), wherein the courts were required, because of exigent circumstances, to implement malapportioned redistricting plans. In the case sub judice, plans with much lower population variance are readily available.

must adhere to the state's political policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act. *See also*, White v. Weiser, 412 US 783, 795, 37 L ed 2d 335, 346 (1973). As adduced at trial, the state's primary political policies reflected in the passage of S. B. 2001 may be summarized as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. As to the latter policy, the majority of the Joint Committee and legislature subscribed to the belief that a plan with two minority districts containing at least 40% black population was preferable to a plan that sacrificed two such "high impact" minority districts for one district with a significant black majority. The prevailing legislative view was that in order to ensure a congressman's responsiveness to the needs and interests of black citizens, the district should be at least 40% black whenever possible; any lesser percentage, in its view, would likely result in insensitivity to the black constituency.

In determining the validity vel non of these state policies, we note the Attorney General's conclusion that the state's action in drawing lines for Districts 1, 2 and 3 from east to west violated § 5 by unlawfully diluting black voting strength. Since the validity of that determination lies at the heart of the proceedings now pending in the District Court of the District of Columbia, we simply accept that decision for the purposes of this ruling without any indication of a view on its merits. No one argues that the second and third policies offend either the Constitution or the Voting Rights Act. As to the last factor, plaintiffs contend only that one 65% black majority district would better serve the interests of blacks than would two 40% or better black population districts since a 65% black district is more likely to assure election of one black congressman. However, we are bound by the

legislative preference for two high black impact districts unless that determination violates constitutional or statutory mandates. We emphasize that it is not our function to substitute our judgment for the state's political program in this respect, absent federal invalidity. We find no federal bar to this aspect of the state's political objective.

At the outset, we note that neither the Constitution nor the Voting Rights Act requires proportional representation. City of Mobile v. Bolden, 446 US 55, 64 L ed 2d 47 (1980); White v. Regester, 412 US 755, 37 L ed 2d 314 (1973). What is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength. *White v. Regester*, *supra*. As noted by the District of Columbia Court in State of Mississippi v. United States, 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.* 444 US 1050 (1980), in applying § 5 criteria: "No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." Moreover, the Fifth Circuit has recognized that "the realities of partisan politics may enable a minority in some circumstances to exact more political concessions by swinging its vote to one of two candidates whose majority-race following is approximately equal than it could by electing a candidate of his own identity." Wyche v. Madison Parish Police Jury, 635 F. 2d 1151, 1160 (5 Cir. 1981). And "[a] court-ordered racial gerrymander which would assure that blacks form a sizeable electoral majority in a single district may not be nearly as effective a guarantee of access as the creation of two or more districts with substantial black voter populations such that all candidates in those districts must be responsive to the needs and aspirations

of the black electorate." United States v. Board of Supervisors of Forrest County, 571 F. 2d 951, 956 (5 Cir. 1978). Since the establishment of a "safe" minority seat is not a federal prerequisite of a reapportionment plan, *Wyche, supra*, at 1161, we conclude that the state's policy of favoring 40% or better black population districts was legitimate.

A consideration of these legitimate state political policies compels us to adopt, as an interim redistricting plan, the Simpson amendment. The Kirksey plans are repugnant to valid state policies inasmuch as they erode the electoral bases of incumbent congressmen in Districts 2 and 4, contain a larger population variance than the Simpson amendment, and disregard the state's policy of creating two high black impact districts. Moreover, these plans represent an obvious racial gerrymander by running a line from District 2 partially into metropolitan Hinds County and the City of Jackson solely to include a large and overwhelming black population corridor having little in common with the rest of what is essentially a rural district.

The Simpson amendment, on the other hand, more nearly satisfies the state's criteria by: (1) preserving constituencies of incumbents; (2) maintaining a population deviation of only .2141%; and (3) creating two 40% or better black districts. In addition, the Simpson amendment accords with racial fairness by including a majority black district of 53.77% centered in the Delta area. Plaintiffs challenge that the Simpson amendment or any other plan without a 65% or better black majority district violates the § 5 standard against retrogression of minority voting strength, relying upon Beer v. United States, 425 US 130, 47 L ed 2d 629 (1976). We reject this argument which is based upon the premise that the correct benchmark for measuring retrogression is former District 3, as it existed in the 1956 plan, and containing 11 Delta counties having a 65.51% black majority under

1960 census figures. Laying aside the state's position that retrogression should be determined by comparison with the 1972 plan, it is clear that since the Voting Rights Act became effective on November 1, 1964, retrogression must be determined in accordance with district lines existing no earlier than that date. The plan then in effect, i.e., the 1962 plan, contained the same Delta counties as the 1956 plan, combined with 13 other counties to form old District 2, which then had a 59.29% black majority population. Of course, if the district lines in effect on November 1, 1964, had never been changed, § 5 retrogression could not be implicated, even if there was a reduction in the percentage of blacks residing in former District 2. Computations show that, under 1980 census figures, the formerly 59.29% black majority district is now comprised of only 48.09% black population. Thus, the Simpson amendment with a 53.77% majority district represents an augmentation, rather than diminution, of black voting strength.

Other significant advantages inherent in the Simpson amendment are that it splits only two sparsely settled counties along established precinct lines, preserves a high degree of community of interest in all five districts, including the black majority District 2 which is chiefly an agricultural area, and satisfies concepts of contiguity and compactness. It is equitable that these considerations be taken into account in choosing a plan. We therefore find that the Simpson amendment most nearly satisfies constitutional and statutory constraints while reconciling state political policy, and direct it be used by the State of Mississippi pending preclearance of a statutorily permissible plan.

Accordingly, the court hereby establishes congressional districts for primary and general elections for 1982, and thereafter until a plan is precleared by the State under § 5 of the Voting Rights Act, as follows:

District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the aforesaid plan is appended to this opinion.

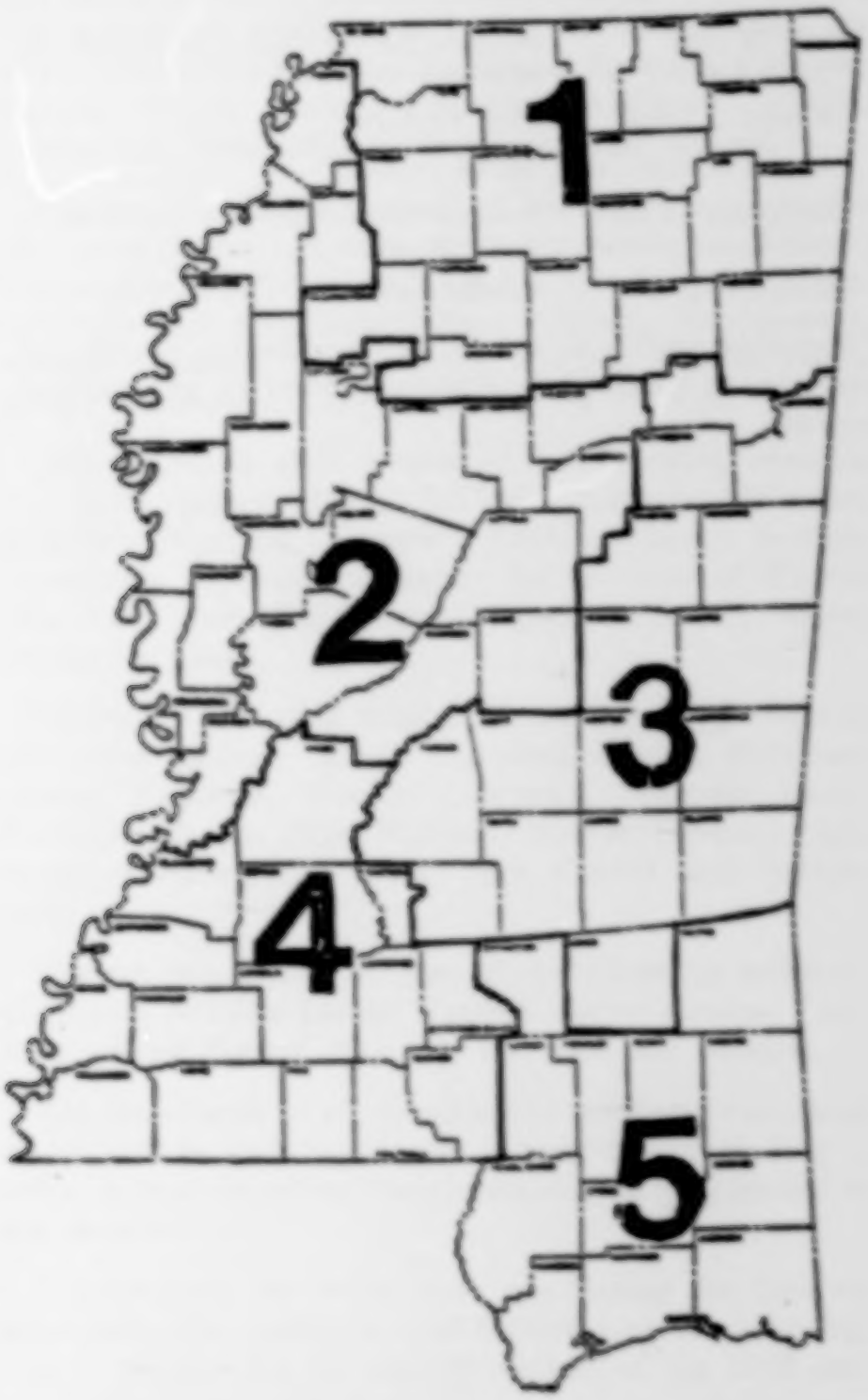
Furthermore, the court, after considering the time requirements for candidate qualification and campaigning, and to prepare for the orderly conduct of the 1982 con-

gressional primary and general elections, orders into effect the following schedules:

July 13, 1983 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1983 [sic]	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

Our order shall also specify further election procedures applicable to the 1982 congressional primary and general elections.

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



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WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

v.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

ORDER

A three-judge court having been convened pursuant to law to hear the above consolidated actions, and after trial having decided the issues in accordance with Memorandum Opinion this date released, it is

ORDERED

1. S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, a statute providing for the redistricting of Mississippi's five congressional districts for the election of members of the United States House of Representatives, is legally unenforceable until it has been precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, and the above named defendants are hereby enjoined from implementing or seeking to implement such statute for election of members of the United States House of Representatives for Mississippi until it has been so precleared.

2. Miss. Code Ann. § 23-5-223 (1972), which prescribes the existing congressional districting plan for the State of Mississippi, is declared unconsitutional as violative of Art. 1, § 2, and the fourteenth amendment to the United States Constitution, and the above named defendants are hereby enjoined from hereafter enforcing or seeking to enforce said statute for election of members of the United States House of Representatives for Mississippi.

3. There is hereby ordered into effect an interim plan establishing congressional districts for primary and general elections for 1982, and thereafter until a redistricting plan enacted by the State of Mississippi is precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, as follows:

District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the foregoing court-ordered interim congressional redistricting plan is appended hereto as Exhibit "A".

4. There is hereby ordered into effect the special time schedule and other procedures respecting the 1982 congressional primary and general elections:

July 13, 1982 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1982	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

5. All persons who have previously announced, paid qualifying fees and otherwise qualified as 1982 candidates for any congressional district may reannounce their candidacy on the basis of the districts hereinabove established and requalify with state and party officials, but are excused from paying additional qualifying fees; and in case a previously announced candidate may choose to run in a district having a different designation by number, such person may, upon direction to the appropriate officials, obtain transfer of the sum so paid. All Mississippi election statutes in conflict with the foregoing terms of this order are stayed only to the extent of such conflict for the initial purpose of conducting the 1982 congressional elections; otherwise provisions of state law remain unaffected.

The above named defendants with statutory and political party authority to conduct the 1982 congressional elections are hereby enjoined and commanded to schedule, prepare for, hold, conduct, and certify such elections strictly in accordance with ¶¶ 3, 4 and 5 hereof.

The court reserves the power to issue supplemental orders, should the need arise, to carry out the provisions of this order.

This, 8th day of June, 1982.

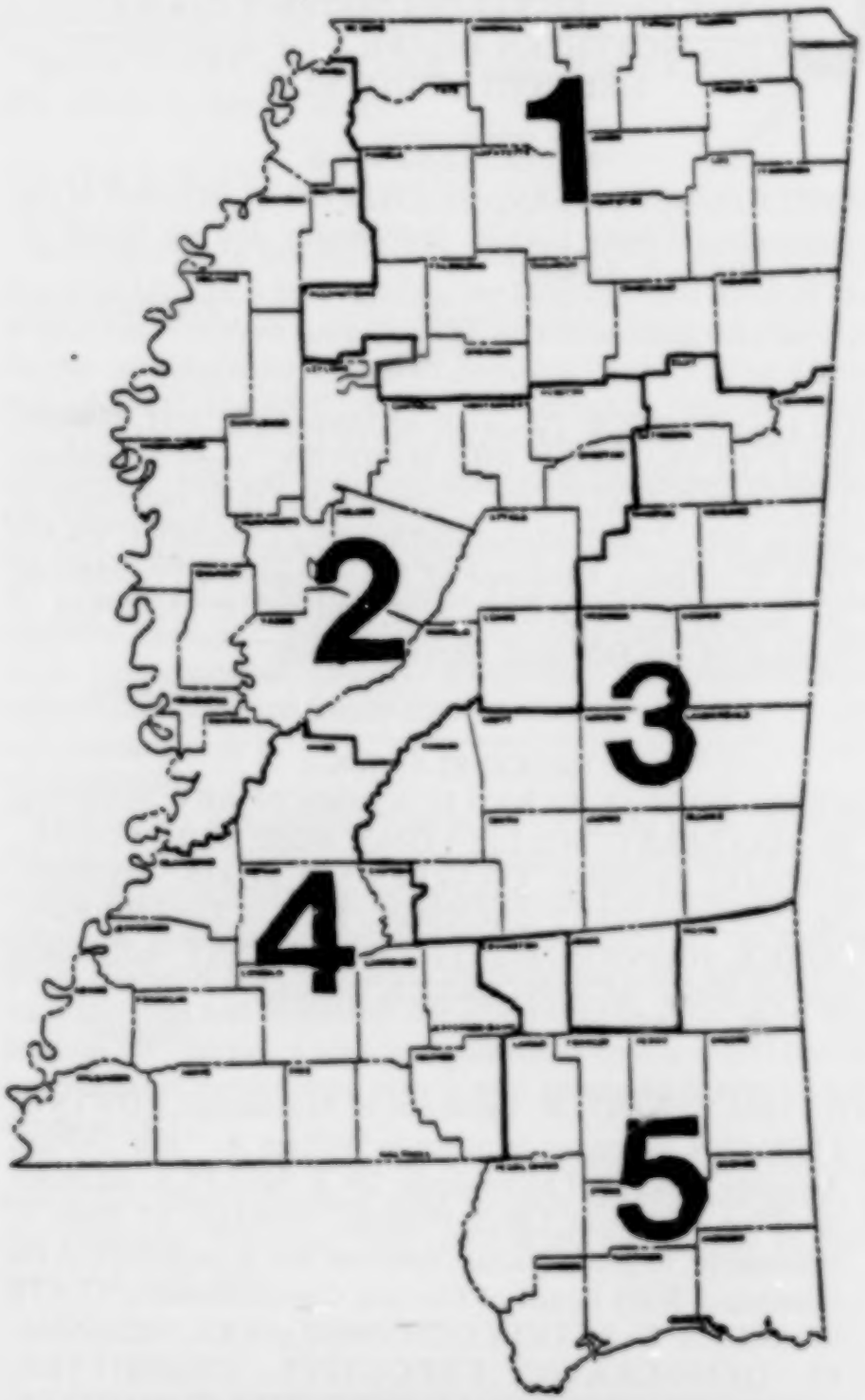
/s/ Charles Clark
United States Circuit Judge

/s/ William C. Keady
United States District Judge

/s/ L. T. Senter, Jr.
United States District Judge
[SEAL]

EXHIBIT "A"

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 82-80-WK-0

DAVID JORDAN and SAMMIE CHESTNUT, on behalf of the Greenwood Voters League, Individually and on behalf of others similarly situated.

Plaintiffs,

v.

WILLIAM WINTER, Governor of Mississippi: T.H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J.C. "CON" MALONEY, Secretary, and their successors in office, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives.

Defendants.

No. GC 82-81-WK-0

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES McLAURIN, SAMUEL McCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of others similarly situated.

Plaintiff,

v.

WILLIAM F. WINTER, Governor of Mississippi; EDWIN L. PITTMAN, successor in office to William A. "Bill" Allain, Attorney General of Mississippi; DICK MOLPUS, successor in office to Edwin Lloyd Pittman, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners; STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants.

(January 6, 1984)

FINAL JUDGMENT

Before CLARK, Chief Circuit Judge, SENTER, Chief Judge, and KEADY, Senior Judge:

BY THE COURT:

Pursuant to the mandate of the Supreme Court of the United States of May 16, 1983, vacating the judgment and order of the district court entered June 10, 1982, and remanding the cases for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended June 29, 1982, ____U.S.____, 77 L.Ed.2d 291 (1983) (Mem.), the district court reconvened, received additional oral and documentary evidence, and considered briefs and argument of counsel. In its bench ruling (appended hereto as Addendum "A"), the court found that the congressional redistricting plan it previously adopted violates amended Section 2, particularly as to the structures of the Second Congressional District. Therefore, the court-ordered redistricting plan previously entered must be revised.

Accordingly, it is

ORDERED:

That until a redistricting plan is duly enacted by the State of Mississippi and precleared in accordance with Section 5 of the Voting Rights Act of 1965, as amended, the five Mississippi congressional districts for the election of members of the United States House of Representatives in the primary and general elections for 1984 and thereafter are established as detailed on Addendum "B" hereto. A map depicting the foregoing court-ordered congressional redistricting plan is also appended hereto as Addendum "C".

The Court reserves the power to issue supplemental directions and orders should the need arise, to carry out the provisions of this judgment. The court also reserves the right to file an opinion at a later date.

This 6th day of January, 1984.

Charles Clark

United States Circuit Judge

L. T. Senter, Jr.

United States District Judge

William C. Keady

United States District Judge

Addendum A

OPINION OF THE COURT
Announced December 21, 1983

BY JUDGE CLARK:

Ladies and Gentlemen. The court has come to a decision which must be implemented with the assistance of the parties in the case because the court does not have the expertise or the precise figures to make a final judgment. Until such time as the Legislature of the State of Mississippi discharges its duty to redistrict the Congressional Districts of the State of Mississippi in accordance with the 1980 census, the court must act under the remand of the Supreme Court of the United States to reconsider its prior decision in this case in light of the reenacted Section 2 of the Voting Rights Act.

The court finds that the plaintiffs have shown by a preponderance of the evidence that the totality of the circumstances show that the political processes in District 2 in particular are not equally open to participation by members of a class protected by Section 2 (A) of the amended Act in that the members of that class have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.

In order to guide the parties in assisting the court to draw a precise decree, the court announces the following guidelines. I'll ask the clerk at this time to hand to each of the parties two lists prepared by the court which relate to District 2.

The Second Congressional District of the State of Mississippi will be comprised of the following whole counties: Bolivar, Carroll, Claiborne, Coahoma, Grenada, Holmes, Humphreys, Issaquena, Jefferson, Quitman, Sharkey, Sunflower, Tunica, Washington, Yazoo, Warren, and Leflore. In addition, the following precincts from the following counties:

Hinds County - the precincts of Bolton, Brownsville, Edwards, Tinnin, Pocahontas, Pinehaven, Raymond 1 & 2, Cayuga, Utica 1 & 2, Chapel Hill, Dry Grove, and Learned.

Tallahatchie County - the precincts of Tippo, Philipp, Glen-

dora, Tutwiler, Sumner, Webb, and Stover.

Attala County - the precincts of Shrock, Possumneck, Sallis, McAdams, and Newport.

Madison County - all of the county except the Ridgeland precinct.

The remaining Congressional District boundaries are to be drawn with the assistance of the parties, with the following directions from the court:

1. Minimize the deviation and variation between all districts.
2. Preserve incumbent representatives where possible.
3. Maximize the black population in District 4 under the following two guidelines:
   (1) Create relatively regular district lines.
   (2) Maintain areas of common interest within the same Congressional District.

The court does not have access to the expertise that the parties have immediate access to in the form of demographers and actual precinct populations by race. It is the court's best estimate, based upon the information that it does have, that the total population of District 2 will be 503,831 persons; that the total black population of that district will be approximately 57.8 percent; and that the total voting age black population of that district will be approximately 52.9 percent.

Addendum B

The boundaries of all counties, supervisors' districts, and precincts listed below shall be such boundaries as they existed on July 1, 1981 (*see* 541 F.Supp. 1135 at 1145, N.D. Miss. 1982), with the exception of the supervisors' districts and precincts of Jones County. Jones County supervisors' districts and precincts referred to are those defined and incorporated in the Consent Judgment entered on October 26, 1983, by the United States District Court for the Southern District of Mississippi in Cause No. H-83-0200(R) styled Jones County Branch, NAACP v. Jones County, Mississippi.

District No. 1 shall consist of the following whole counties:

Alcorn	Itawamba	Montgomery	Tishomingo
Benton	Lafayette	Pontotoc	Union
Calhoun	Lee	Prentiss	Webster
Chickasaw	Marshall	Tate	Yalobusha
DeSoto	Monroe	Tippah	

together with the following parts of counties:

Choctaw County	All except for the Panhandle Precinct;
Panola County	All except for the precincts of Crenshaw, Curtis, East Crowder, Longtown, Pleasant Grove, and South Curtis;
Tallahatchie County	All precincts located in Supervisors Districts 1, 2 and 3.

District no. 2 shall consist of the following whole counties:

Bolivar	Holmes	Leflore	Tunica
Carroll	Humphreys	Quiteman	Warren
Claiborne	Issaquena	Sharkey	Washington
Coahoma	Jefferson	Sunflower	Yazoo
Grenada			

together with the following parts of counties:

Attala county	the precincts of McAdams, Newport, Sallis, Shrock, and Possumneck;
Hinds County	the precints of Bolton, Brownsville, Cayuga, Chapel Hill, Dry Grove, Edwards, Learned, Pinehaven, Pocahontas, Raymond 1, Raymond 2, Tinnin, Utica 1, and Utica 2;
Madison County	All except the precinct of Ridgeland;
Panola County	The precincts of Crenshaw, Curtis, East Crowder, Longtown, Pleasant Grove, and South Curtis;
Tallahatchie County	All precincts located in Supervisors' District 4 and 5.

District No. 3 shall consist of the following whole counties:

Clarke	Lauderdale	Neshoba	Scott
Clay	Leake	Noxubee	Smith
Jasper	Lowndes	Oktibbeha	Winston
Kemper			

together with the following parts of counties:

Attala County	All except for the precints of McAdams, Newport, Sallis, Shrock, and Possumneck;
Choctaw County	The Panhandle precinct;
Jones County	All new precincts located in new Supervisors' Districts Nos. 1, 2, and 5; The new Blackwell Precinct in new Supervisors' District No. 4; and All of new Supervisors' District 3 except the new precincts of Glade, Ovett, and Tuckers;
Madison County	The Ridgeland precinct;
Rankin County	All except for the precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star.

District No. 4 shall consist of the following whole counties:

Adams	Franklin	Lincoln	Simpson
Amite	Jeff. Davis	Marion	Walthall
Copiah	Lawrence	Pike	Wilkinson
Covington			

together with the following parts of counties:

Hinds County	All except the precincts of Bolton, Brownsville, Cayuga, Chapel Hill, Dry Grove, Edwards, Learned, Pinehaven, Pocahontas, Raymond 1, Raymond 2, Tinnin, Utica 1, and Utica 2.
Rankin County	The precincts of Cato, Clear Branch, County Line, Dobson, Dry Creek, Johns, Mountain Creek, Puckett, and Star.

District No. 5 shall consist of the following whole counties:

Forrest	Hancock	Lamar	Perry
George	Harrison	Pearl River	Stone
Greene	Jackson	Perry	Wayne

together with the following parts of counties:

Jones County	All new precincts in new Supervisors' District 4 except the new Blackwell Precinct; and in new Supervisors' District 3, the new precincts of Glade, Ovett, and Tuckers.

The statistics for each of the five congressional districts defined above are as follows:

Congressional District	Total Population	Percent Variance from the Norm	Black Population	% Black	Total Voting Age Pop. (VAP)	Black VAP	%Black VAP
1	504,077	-.0101%	124,136	24.63%	346,074	74,165	21.43%
2	504,024	-.0206%	293,838	58.30%	322,719	170,491	52.83%
3	504,242	+.0226%	161,710	32.07%	348,524	98,478	28.26%
4	504,187	+.0117%	211,714	41.99%	346,370	129,618	37.42%
5	504,108	-.0040%	95,808	19.01%	342,754	57,068	16.65%

Maximum Range .0432%

Addendum C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 82-80-WK-0
(Three-Judge Court)

DAVID JORDAN, et al.,

Plaintiffs,

v.

WILLIAM F. WINTER, et al.,

Defendants.

No. GC 82-81-WK-0
(Three-Judge Court)
(Consolidated with)

OWEN H. BROOKS, et al.,

Plaintiffs,

v.

WILLIAM F. WINTER, et al.,

Defendants.

ORDER

The Republican defendants' motion to amend the judgment is DENIED. The court continues to reserve the right to file an opinion at a later date.

THIS, the 20th day of January, 1984.

Charles Clark

Charles Clark, U.S. Circuit Judge

L.T. Senter, Jr.

L.T. Senter, Jr., U.S. District Judge

William C. Keady

William C. Keady, U. S. District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 82-80-WK-0

DAVID JORDAN, et al,

Plaintiffs,

v.

WILLIAM WINTER, et al.,

Defendants.

No. GC 82-81-WK-0

OWEN H. BROOKS, et al.,

Plaintiffs,

WILLIAM F. WINTER, et al.,

Defendants.

ORDER OF CLARIFICATION

Upon defendant Republican Executive Comittee's *Ore Tenus* request for clarification of the court's January 20, 1984, order denying Republican defendants' motion to amend the judgment entered in this cause on January 6, 1984, the court declares that in denying Republican defendants' motion to amend judgment, the court addressed the merits of said motion, reaffirming the constitutionality of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended June 29, 1982, and in so ruling, the court did not reach the procedural objections raised by the Brooks plaintiffs.

This 25th day of January, 1984.

Charles Clark

United States Circuit Judge

L. T. Senter Jr.

United States District Judge

William C. Keady

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISON

No. GC 82-80-WK-0

DAVID JORDAN, et al.,

Plaintiffs

v.

WILLIAM WINTER, et al.

Defendants

No. GC 82-81-WK-0

OWEN H. BROOKS, et al.,

Plaintiffs

v.

WILLIAM F. Winter, et al.

Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Mississippi Republican Executive Committee, Defendants in Brooks v. Winter, Civil No. GC-82-81-WK-0, which has been consolidated with *Jordan v. Winter*, Civil No. GC-82-80-WK-0, hereby appeals to the Supreme Court of the United States from the Final Judgment entered in these consolidated actions on January 6, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

JONES, MOCKBEE & BASS

By: Michael B. Wallace
Michael B. Wallace

JONES, MOCKBEE & BASS
1080 Flynt Drive
Suite E
P.O. Box 55507
Jackson, Mississippi 39216
Tel. (601) 939-3895

CERTIFICATE OF SERVICE

I, Michael B. Wallace, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Memorandum of Authorities in Support of Motion of the Republican Defendants to Modify the Judgment Pending Appeal, to the following:

Jerris Leonard, Esquire
Kathleen Heenan McGuan, Esquire
Jerris Leonard, P.C.
900 Seventeenth St., N.W.
Suite 1020
Washington, D.C. 20006

Champ Terney, Esquire
Hubbard T. Saunders, IV, Esquire
Vicki Martinson, Esquire
Crosthwait, Terney, Noble & Eastland
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201

Johnnie E. Walls, Jr., Esquire
Walls, Buck & Irving, Ltd.
P.O. Box 634
Greenville, Mississippi 38701

Frank R. Parker, Esquire
William L. Robinson, Esquire
Patricia Hanrahan, Esquire
Lawyers' Committee for Civil Rights Under Law
1400 I Street, N.W.
Suite 400
Washington, D.C. 20005

Honorable Edwin Lloyd Pittman
William S. Boyd, Special Assistant Attorney General
P.O. Box 220
Jackson, Mississippi 39205

Robert Bruce McDuff, Esquire
University of Mississippi
School of Law
University of Mississippi 38677

Alvin O. Chambliss, Esquire
Leonard McClellan, Esquire
North Mississippi Rural Legal Services
P.O. Box 928
Oxford, Mississippi 38655

Willie Perkins, Esquire
North Mississippi Rural Legal Services
P.O. Box 1909
Greenwood, Mississippi 38930

R. Scott Levanway, Esquire
P.O. Box 1429
Jackson, Mississippi 39205

Danny Cupit, Esquire
P.O. Box 22666
Jackson, Mississippi 39205

This the 29th day of February, 1984.

Michael B. Wallace

Michael B. Wallace

APPENDIX F
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fifteenth Amendment:

> **Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> **Section 2.** The Congress shall have power to enforce the article by appropriate legislation.

42 U.S.C. 1973:

> (a)No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection(b).
>
> (b)A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes

a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973C:

Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determininations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualifications, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right

to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

APPELLEE'S

BRIEF

No. 83-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, *Appellants*,

v.

OWEN H. BROOKS, *et al.*, *Appellees*,

and

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, *et al.*, *Appellees*.

On Appeal From The United States District Court For The Northern District Of Mississippi

STATE OFFICIAL APPELLEES' STATEMENT IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

EDWIN LLOYD PITTMAN
Attorney General
State of Mississippi
*JERRIS LEONARD
KATHLEEN HEENAN MCGUAN
Law Offices of Jerris Leonard, P.C.
900 17th Street, N.W., Suite 1020
Washington, D.C. 20006
202-872-1095
CHAMP TERNEY
HUBBARD T. SAUNDERS, IV
CROSTHWAIT, TERNEY, NOBLE & EASTLAND
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201
601-352-5533
Attorneys for State Official Appellees
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

6pp

PARTIES TO THE PROCEEDING BELOW

The Appellants, the Mississippi Republican Executive Committee, were defendants in the consolidated actions below.

The Appellees herein were also defendants below:

Bill Allain, Governor of Mississippi, replacing former Governor William Winter pursuant to this Court's Rule 40.3; Edwin Lloyd Pittman, Attorney General, replacing Bill Allain in that capacity; Dick Molpus, Secretary of State, replacing Edwin Lloyd Pittman in that capacity; the State Board of Election Commissioners (collectively referred to as state official appellees); Mississippi Republican Executive Committee; Mississippi Democratic Executive Committee. The following Defendants were dismissed by order of the District Court on May 7, 1982: Brad Dye, Lieutenant Governor; Clarence B. "Buddie" Newman, Speaker of the House of Representatives; T. H. Campbell III, Chairman, Bill Harpole, Vice-Chairman, and J. C. "Con" Maloney, Secretary, of the Joint Congressional Redistricting Committee.

Plaintiffs in the consolidated actions below, Appellees herein, are: Owen H. Brooks, Reverend Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Reverend Carl Brown, June E. Johnson, and Lee Ethel Henry, individually and on behalf of all others similarly situated; and David Jordan and Sammie Chestnut, on behalf of the Greenwood Voters League, individually and on behalf of all others similarly situated.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1722

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, *Appellants*,

v.

OWEN H. BROOKS, *et al.*, *Appellees*,

and

WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, *et al.*, *Appellees*.

On Appeal From The United States District Court For The Northern District Of Mississippi

STATE OFFICIAL APPELLEES' STATEMENT IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

JURISDICTION

The appellees agree that the Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1253.

This Statement In Support of the Mississippi Republican Executive Committee's Jurisdictional Statement is filed within the time permitted by a letter from the Clerk of this Court dated May 4, 1984, extending the state official appellees' time for response to and including June 16, 1984. *See* copy of letter contained in Appendix A.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The state official appellees, William A. Allain, *et al.*, agree that the questions presented by the Mississippi Republican Executive Committee are substantial.

CONCLUSION

The appellees respectfully request this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

EDWIN LLOYD PITTMAN
Attorney General
State of Mississippi

By: _____

*JERRIS LEONARD
KATHLEEN HEENAN MCGUAN
Law Offices of Jerris Leonard, P.C.
900 17th Street, N.W., Suite 1020
Washington, D.C. 20006
202-872-1095

CHAMP TERNEY
HUBBARD T. SAUNDERS, IV
CROSTHWAIT, TERNEY, NOBLE & EASTLAND
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201
601-352-5533

Attorneys for State Official Appellees
**Counsel of Record*

APPENDIX

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

May 4, 1984

Jerris Leonard, Esq.
Law Office of Jerris Leonard, P.C.
900 17th Street, NW., Suite 1020
Washington, DC 20006

RE: Mississippi Republican Executive Committee
v. Owen H. Brooks, et al.
No. 83-1722

Dear Mr. Leonard:

Your request of May 3, 1984 for an extension of time within which to file a consolidated response to the above-entitled appeal and appeal to be filed by Brooks appellants has been granted and your time has been extended to and including June 16, 1984.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
FRANCIS J. LORSON
Chief Deputy Clerk

gtb
cc: Counsel of record

MOTION

No. 83-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,
Appellant,

v.

OWEN H. BROOKS, *et al.*

On Appeal from the United States District Court for the Northern District of Mississippi

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MOTION TO DISMISS OR AFFIRM OF OWEN H. BROOKS, ET AL., APPELLEES

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1400 I Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

ROBERT BRUCE MCDUFF
University of Mississippi Law School
University, Mississippi 38677
(601) 232-5483

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

Attorneys for Owen H. Brooks, et al., Appellees

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Mississippi Republican Executive Committee, which withdrew from active participation in this case shortly after it was filed and consented to the entry of any judgment by the District Court, is now estopped from challenging the District Court's final judgment.

2. Whether the Mississippi Republican Executive Committee, which is a defendant in this case solely because it is responsible for overseeing congressional primary elections and therefore is merely a stakeholder in this controversy without any authority over congressional redistricting, suffers the required direct and legally-cognizable "injury in fact" necessary to give the appellant standing to challenge the District Court's judgment.

3. Whether Congress, after clearly declaring its purpose to eliminate the requirement of proving discriminatory intent in the 1982 amendment to Section 2 of the Voting Rights Act, inadvertently incorporated an intent test in the new statute.

4. Whether Congress has the power pursuant to the Enforcement Clauses of the Fourteenth and Fifteenth Amendments to legislate against voting practices and procedures which have a racially discriminatory result.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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MOTION TO DISMISS OR AFFIRM OF OWEN H. BROOKS, ET AL., APPELLEES

Appellees Owen H. Brooks, et al., who are eleven black registered voters of Mississippi who reside in the Delta area of the state, move the Court pursuant to Sup. Ct. Rule 16 to dismiss this appeal or, alternatively, summarily to affirm the District Court's decision sustaining the constitutionality of Section 2 of the Voting Rights Act of 1965, as amended in 1982.[1]

[1] Owen H. Brooks, et al., who are appellees in this appeal, also are appellants in *Brooks* v. *Allain*, No. 83-1865, docketed May 15, 1984. In that appeal appellants contest the validity of the District Court's 1984 court-ordered plan, contending that the District Court misapplied Section 2 standards in formulating an inadequate remedy and also violated judicial standards governing the formulation of court-ordered redistricting plans.

OPINION BELOW

The District Court's opinion rejecting appellant's contentions and sustaining the constitutionality of the 1982 amendment to Section 2 of the Voting Rights Act was rendered on April 16, 1984, and is not included as an appendix to the appellant's Jurisdictional Statement. The opinion is as yet unreported and is attached hereto as Appendix A.

STATEMENT OF THE CASE

In March, 1982, the Attorney General objected pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, to the State of Mississippi's 1981 congressional redistricting plan (the "least change" plan) for unlawful fragmentation and dilution of black voting strength in the heavily-black Mississippi Delta area of the state.[2] Although the Mississippi Legislature was then in session when the Attorney General's Section 5 objection was announced, and has held two regular sessions since then, no new legislative congressional redistricting plan has been enacted by the Mississippi Legislature.[3]

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[2] In his Section 5 objection letter, the Attorney General found that prior to the enactment of the Voting Rights Act, Mississippi had one congressional district in the Mississippi Delta area which was 65 percent black. The Mississippi Legislature's 1981 plan, he found, contained districts which "have been drawn horizontally across the majority-black Delta area in such a manner as to dismember the black population concentration and effectively dilute its voting strength." See *Brooks* v. *Winter*, No. 82-233, Jurisdictional Statement, Appendix B, pp. 25a-29a.

The past history of congressional redistricting in Mississippi is set out in Jurisdictional Statement, *Brooks* v. *Winter*, No. 82-233, pp. 16-23, and in *Mississippi* v. *Smith*, 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court), *appeal dism'd*, 103 S.Ct. 1888 (1983).

[3] Mississippi filed a judicial preclearance action in the District Court for the District of Columbia for approval of its 1981 plan, but that action was voluntarily dismissed by the State after the District Court denied the State's motion for summary judgment. *Mississippi* v. *Smith*, *supra*.

Appellees Owen H. Brooks, et al., filed this class action in April, 1982, seeking a court-ordered plan for the conduct of congressional elections. After a trial, a three-judge District Court in June, 1982 enjoined use of the "least change" plan based on the Section 5 objection, enjoined use of the then-existing 1972 plan because it was unconstitutionally malapportioned according to the 1980 Census, and ordered into effect a temporary court-ordered plan (the "Simpson plan") for use in the 1982 congressional elections. *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court), *vacated and remanded sub nom. Brooks* v. *Winter*, 103 S.Ct. 2077 (1983). The black voter plaintiffs appealed, contending that the temporary 1982 court-ordered plan unlawfully diluted black voting strength by unnecessarily combining thirteen majority-black Delta counties with six predominantly-white, east-central Hill counties. This plan unnecessarily minimized and diminished black voting strength, plaintiffs contended, in the face of alternative plans which would have preserved the Delta area intact in a single compact and contiguous district without including these predominantly-white Hill counties. *Brooks v. Winter*, No. 82-233, Jurisdictional Statement, pp. 5-6, 23-30.

This Court in May, 1983 vacated and remanded the District Court's decision "for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973, as amended in 1982." *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983).

On remand, after a two-and-a-half day trial at which the District Court received extensive expert and lay witness testimony and exhibits, the District Court sustained the black voter plaintiffs' contention that the 1982 court-ordered plan violated their rights secured by Section 2 of the Voting Rights Act, as amended in 1982. The District Court found that Mississippi has a long official history of purposeful discrimination which has affected the rights of black citizens to vote, the continu-

ing effects of which "presently impede black voter registration and turnout" in the Delta area. App. A, *infra*, p. 9a. Socio-economic disparities of significant proportions between whites and blacks in the Delta area in education, income, employment, and housing also are "probative of minorities' unequal access to the political process," the District Court determined. *Id.*, pp. 9a-10a. The District Court also found that race dominates voting in Mississippi and in the Delta area as demonstrated by "a consistently high degree of racially polarized voting in the 1982 elections and previous elections." *Id.*, p. 11a. The court concluded that "blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race," and that "racial bloc voting operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population." *Id.*, p. 11a. The court also found that "racial campaign tactics" by the white Republican candidate characterized the 1982 congressional campaign in the Second Congressional District, and that "[t]his inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts." *Id.*, p. 12a.[4]

The District Court concluded that on the basis of "the aggregate" (*id.*, p. 8a) of these factors the 1982 court-ordered plan unlawfully diluted black voting strength because it combined the majority black Delta area with six predominantly-white eastern counties to create a district which was majority white in voting age population. This combination, the court held, "when considered in light of the effects of past discrimination on black efforts to participate in political affairs and the existence of racially polarized voting, operated to minimize, cancel, or dilute black voting strength in the Second District." *Id.*, p. 11a. For relief, the District Court ordered into effect for the 1984 congressional elections a new court-ordered plan which was devised by the District Court judges themselves. This new plan excluded from the Second Congressional District five of the six predominantly-white Hill counties which formerly were included in that district, and added two majority-black River counties, portions of Hinds County, and precincts from other Delta counties which increased the black voting age population percentage in the Second District to 52.83 percent (from 48.05 percent).

[4] The general election contest was largely a head-to-head contest between state Rep. Robert Clark, black, the Democratic nominee and a veteran state legislator, and Webb Franklin, white, the Republican nominee and a former state court judge. The trial testimony showed that during the campaign Franklin appealed to white racist sentiments by featuring Clark's picture in his campaign ads, by adopting the campaign slogan "He's One of Us," and by using television ads which evoked old segregationist symbols and code words (Tr. 63-87, Ex. P-71). App. A, p. 12a, n. 8.

Contrary to the Mississippi Republican Executive Committee's statement in its Jurisdictional Statement (p. 3), the District Court did not disregard state policies in devising its new plan. The court enumerated the primary policies governing its new interim plan as: "(1) achieve the least possible deviation from the one person, one vote ideal . . . , (2) design a plan that is not racially discriminatory in either purpose or effect, . . . ; and (3) adhere to the state's policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act, . . ." *Id.*, pp. 12a-13a (citations omitted). The District Court did determine that complete dependence upon its prior policy of creating two "high impact" districts, that is, combining black population concentrations with white concentrations to create two 40 percent or better black districts, conflicted with Section 2's prohibition on dilution of black voting strength. *Id.*, p. 11a. However, the District Court stated that one of the criteria employed in the new interim plan was to "comply with the legislative

goal of achieving high impact districts without splintering cohesive black populations" (*id.*, p. 13a).

There is also no hint in the District Court's opinion, contrary to the Republican Committee's unfounded assertion (Jurisdictional Statement, pp. 3-4 n. 3), that the District Court devised its new plan with an intent to insure that the white Republican incumbent in the Second District would not be reelected. The District Court made it clear that it was revising its new plan simply to remedy the dilution of black voting strength it found in its prior 1982 plan. Alternative plans proposed by the plaintiffs which achieved a significantly higher black voting age population majority in the Second District (60 percent black VAP) were rejected by the District Court "[a]lthough the plans proposed by plaintiffs would probably insure the election of a black congressman in the Second District" (*id.*, p. 15a).

The District Court in its written opinion also specifically considered but completely rejected the principal arguments made by the Republican Executive Committee in its Jurisdictional Statement. The District Court held that the 1982 amendment to Section 2 of the Voting Rights Act "was designed to eliminate the requirement, prescribed in *City of Mobile* v. *Bolden*, 446 U.S. 55, 100 S.Ct. 2332 (1980), that a plaintiff demonstrate intentional discrimination to establish a violation of Section 2" (*id.*, p. 6a), and found the Mississippi Republican Committee's argument that amended Section 2 preserves the intent requirement "to be meritless as it runs counter to the plain language of amended § 2, its legislative history, and judicial and scholarly interpretation" (*id.*, p. 6a, n. 5). The court also rejected the Republican Committee's contention that Section 2, if construed to reach discriminatory results, exceeds Congress's enforcement power under the Fifteenth Amendment, and explicitly adopted the analysis and conclusions of the three-judge District Court in *Major* v. *Treen*, 574 F. Supp. 325, 342-

49 (E.D. La. 1983) (*id.*, p. 7a), sustaining the constitutionality of the 1982 amendment to Section 2.

After filing their notice of appeal, the Mississippi Republican Executive Committee applied to this Court for a stay reinstating the District Court's 1982 court-ordered plan. Their application was denied by Justice White, renewed, and then denied by the full Court on April 2, 1984. *Mississippi Republican Executive Committee* v. *Brooks*, 52 U.S.L.W. 3720 (U.S. April 2, 1984) (No. A-766).

MOTION TO DISMISS

Appellees Owen H. Brooks, et al., move the Court to dismiss this appeal for the reason that the Mississippi Republican Executive Committee, by withdrawing from active participation in the case of its own accord and by consenting to the entry of any final judgment deemed appropriate by the District Court, is now estopped by its own actions and by a consent order entered by the District Court at its request from challenging the basis of the District Court's final judgment of January 6, 1984. In addition, appellees move the Court to dismiss this appeal for the reason that there is no justiciable case or controversy involving the Mississippi Republican Executive Committee. The Mississippi Republican Executive Committee was joined as a defendant in this case merely because it is responsible for overseeing congressional primary elections, and therefore is a mere stakeholder in this controversy, has no authority over congressional redistricting in Mississippi, and lacks standing to challenge the District Court's final judgment because it has not alleged or proved that it "personally has suffered some actual or threatened injury as a result" of the District Court's judgment. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979).

I. THE MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE IS ESTOPPED FROM CHALLENGING THE DISTRICT COURT'S FINAL JUDGMENT BECAUSE IT CONSENTED TO THE ENTRY OF ANY FINAL JUDGMENT AND WAS RELIEVED FROM ACTIVE PARTICIPATION IN THIS CASE AT ITS OWN REQUEST.

In its Answer filed to the Complaint in this action, the Mississippi Republican Party Executive Committee asked to be dismissed as a party to this action and pledged to abide by "any decree whatsoever" entered by the District Court regarding congressional redistricting.[5] Then, shortly thereafter, the Republican Committee in forwarding a proposed Consent Order for entry by the District Court relieving the Committee of any further participation in the case, again consented to any relief granted by the District Court.[6] A little more than three weeks after this action was filed, the District Court entered the Consent Order which was requested by both the Mississippi Democratic and Republican Executive Committees and agreed to by counsel for both committees. A copy of that Consent Order is attached hereto as Appendix B. The order recites that both party executive committees "having entered appearance in this cause and having by pleadings consented to the entry of judgment in this case as respects redistricting as litigated to conclusion by the remaining parties and as ordered by the Court," the party committees "are relieved from the necessity of all further pleadings and appearances," "no relief thereasto is appropriate as against them, but said defendants will be bound by all orders of this Court," the party defendants "may take part in any ancillary proceedings wherein their interests are affected, otherwise to take no further part in this litigation," and "no costs are taxed as against" the party executive committees. Consent Order of April 29, 1982 (Appendix B, attached).

The Republican Executive Committee has not filed any motion to alter or amend the Consent Order of April 29, 1982.

Under these circumstances, the Republican Executive Committee is barred by its own Answer, its request to the District Court for relief from participation, and by the Consent Order of April 29, 1982 from attacking the District Court's Final Judgment of January 6. The Republican Executive Committee pledged itself in pleadings filed in the District Court to abide by the District Court's final judgment—whatever that judgment might be. The Republican Committee did not actively participate in any of the discovery in this action and did not participate in the trial. For these reasons, the Republican Committee is estopped from challenging the District Court's final judgment and lacks standing—by virtue of its withdrawal from participation in this case and its consent to any final judgment—to maintain this appeal.

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[5] In its Answer, the defendant Mississippi Republican Party Executive Committee asserted:

> Defendant offers its consent to the entry of *any decree whatsoever* which this court may adopt with respect to the matter of congressional redistricting, upon a final hearing, and prays its dismissal from this suit to await the day when such decree may be entered, with notice to this defendant, so that it may conform to the mandate thereof, as is and ever shall be its right and its duty.

Separate Answer and Defenses of Defendant, Mississippi Republican Party Executive Committee, p. 6, Sixth Defense (emphasis added).

[6] The letter stated:

> Pursuant to my telephone call with your clerk, I enclose a Consent Order whereby the Democratic and Republican Parties consent to the relief finally granted the plaintiffs in this case and ask leave to make no future appearances.

Letter from Michael S. Allred, attorney for the Mississippi Republican Party Executive Committee, to District Judge William C. Keady, April 28, 1982.

II. THE MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE LACKS STANDING TO MAINTAIN THIS APPEAL BECAUSE THERE IS NO ARTICLE III JUSTICIABLE CASE OR CONTROVERSY INVOLVING THE REPUBLICAN COMMITTEE.

Article III of the United States Constitution requires a "case or controversy" for this Court to have appellate jurisdiction of an action; the absence of the requisite justiciable case or controversy deprives this Court of jurisdiction of an appeal. *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975); *DeFunis* v. *Odegaard*, 416 U.S. 312, 319 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973).[7] The judicial power of the United States "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). The Article III standing doctrine requires the party who invokes this Court's appellate jurisdiction to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 99, and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976). Absent these restrictions on Federal jurisdiction, the judicial process would be "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *SCRAP*, 412 U.S. 669, 687 (1973).

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[7] Appellees Owen H. Brooks, et al., raised the standing issue in the District Court in opposing the motion of the Mississippi Republican Executive Committee to amend the final judgment of the District Court. Brooks' plaintiffs' memorandum of law in support of their motion to strike and in opposition to motion of the Republican defendants to amend judgment, p. 3.

The standing requirement demands that "a party seeking review must allege facts showing that he is himself adversely affected" by the challenged action, *Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972). The exercise of judicial power is "restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate." *Valley Forge Christian College*, *supra*, 454 U.S. at 473. The Court has held that the litigant "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). The litigant's complaint must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). Proper regard for the separation of powers ordained by the Constitution forbids that this Court "hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury." *Valley Forge Christian College*, *supra*, 454 U.S. at 474.

Here the Mississippi Republican Executive Committee as the body charged with overseeing Republican primary elections in Mississippi has utterly failed in its burden to show "not only that the statute is invalid but that [it] has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that [it] suffers in some indefinite way in common with people generally . . ." *Frothingham* v. *Mellon*, 262 U.S. 447, 488 (1923). As previously discussed, the Republican Committee is a defendant in this action solely and exclusively because of its control under Mississippi law over the holding of party primary elections. In its Answer, the Republican Committee disclaimed any interest in the final outcome of this litigation whatsoever, and agreed to abide by the final decision

of the District Court whatever the outcome. There is no specific and concrete proof that the final judgment of the District Court in any way violates any cognizable statutory or constitutional right or interest of the Mississippi Republican Executive Committee. There is no "injury in fact" which this Court traditionally has required for a justiciable case or controversy.

None of the possible allegations the Republican Committee can make would be sufficient to supply the direct "injury in fact" or threatened injury required to confer standing. The Republican Committee cannot acquire standing by asserting that the District Court's new plan jeopardizes the reelection chances of the incumbent Republican congressman in the Second Congressional District. There is no direct proof that a five percent increase in the black voting age population of the Second District, in and of itself, is sufficient to defeat the Republican incumbent. But even if there was such proof, the claimed injury would be to a third party who himself has not seen fit to intervene or participate in this litigation, and appellant "cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, *supra*, 422 U.S. at 499; *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 100.

> There are good and sufficient reasons for this prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them. See Singleton v. Wulff, 428 U.S. 106, 113-114 (1976).

Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978).

The only other possible claim is that the District Court's new plan reduces the possible voting strength of white voters in the Second District. But the Mississippi

Republican Executive Committee has made no claim, nor can it make a valid claim, that it represents the interests of white voters in the Second Congressional District of Mississippi. Further, even if the District Court's plan deprives white voters of a registered majority in that district or a substantial electoral influence—and there has been no proof that it does—the plan does not in any way interfere with any cognizable legal right of white voters where there is no proof that white voters are fenced out from equal participation in the political process or that the plan minimizes or unfairly cancels out white voting strength. Cf. *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 165-68 (1977) (plurality opinion).

All that the appellant is asserting is a general complaint about the operation of Section 2 and Section 5 of the Voting Rights Act and its general dissatisfaction with the new Mississippi court-ordered congressional redistricting plan ordered into effect in an effort to protect the voting rights of black voters from unlawful dilution. Having lost its arguments in the legislative forum of Congress, appellant seeks to turn the forum of this Court's appellate jurisdiction into a debating society "for the vindication of the value interests of concerned bystanders." Appellant's mere assertion of arguments concerning the legislative power of Congress to enact the 1982 amendment to Section 2 cannot create sufficient standing to allow appellant to maintain this appeal, and the Article III restrictions on the appellate jurisdiction of this Court require that appellant's appeal be dismissed.

MOTION TO AFFIRM

Alternatively, appellees Owen H. Brooks, et al., move the Court to affirm the judgment of the three-judge District Court sustaining the constitutionality of the 1982 amendment to Section 2 of the Voting Rights Act, Pub. L. No. 97-205, § 3, 96 Stat. 134, and applying it to vacate

the 1982 court-ordered plan ordered into effect in this case.

The District Court's decision specifically was based on the 1983 mandate of this Court vacating its prior judgment and remanding the case "for further consideration in light of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973, as amended in 1982." *Brooks* v. *Winter*, 103 S.Ct. 2077 (1983).[8] While appellant is correct that this appeal presents to this Court for the first time the questions of the construction and the constitutionality of the 1982 amendment to Section 2, there is no need for this Court to give plenary consideration to this appeal. First, the District Court applied Section 2 to vacate its own prior court-ordered plan, not a legislatively-enacted plan. As this Court frequently has noted, court-ordered redistricting plans are to be judged by stricter standards than those governing legislatively-enacted plans and must be devised in a manner "free from any taint of arbitrariness or discrimination," *Connor* v. *Finch*, 431 U.S. 407, 415 (1977) (quoting from *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964)). Thus, there is less interference with the state's legislative process than in the case in which a legislatively-enacted plan is struck down for Section 2 violations.

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[8] On several occasions this Court has vacated judgments below decided on constitutional grounds or on the prior statutory standard for reconsideration in light of the 1982 amendment to Section 2. See, e.g., *Escambia County, Florida* v. *McMillan*, No. 82-1395 (March 27, 1984); *Cross* v. *Baxter*, 103 S.Ct. 1515 (1983).

Appellant challenges this Court's judgment by arguing that Section 2 has no applicability in a Section 5 case (Juriadictional Statement, pp. 10-12). This argument fails to present any issue in this case. The District Court found that the existing congressional districts were unconstitutionally malapportioned, and was required to devise a remedy which, after the 1982 amendment to Section 2 was enacted, was required to be in compliance with Section 2, an issue not considered by the District Court in its first decision.

Second, contrary to appellant's assertions (Jurisdictional Statement, pp. 4-5), there is no substantial question concerning the constitutionality or construction of the amended Section 2. Congress, in enacting this section, displayed an exceptional sensitivity to the constitutional limitations on its powers to enforce the Fourteenth and Fifteenth Amendments. S. Rep. No. 97-417, 97th Cong., 2d Sess. 39-43 (1982), *reprinted in* [1982] U.S. Code Cong. & Ad. News 177, 217-21; H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 31-32 (1981). The section was carefully tailored by Congress to provide effective enforcement of the Fourteenth and Fifteenth Amendments as construed by this Court in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), and other decisions.

Although the issue of the constitutionality of Section 2 has been raised in a number of cases, no court has held the amended Section 2 unconstitutional, and every court which has addressed the issue has sustained its constitutionality against a variety of arguments, including those made here, *United States* v. *Marengo County Commission*, No. 81-7796 (11th Cir. May 14, 1984) (slip op. at 3126-33); *Jones* v. *City of Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984); *Major* v. *Treen*, 574 F. Supp. 325, 342-49 (E.D. La. 1983) (three-judge court); cf. *Gingles* v. *Edmisten*, Civil No. 81-803-CIV-5 (E.D.N.C. Jan. 27, 1984) (three-judge court) (slip op. at 19) (constitutionality of Section 2 assumed in the absence of challenge), *appeal docketed*, No. 83-1968 (U.S. June 8, 1984). These courts, and others, also have interpreted the new statute in a manner identical to the construction given by the District Court here. The arguments made by appellants and similar arguments concerning the constitutionality and construction of the amended Section 2 also have been rejected in scholarly commentary on the new statute. See, e.g., Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 739-53 (1982); Parker, *The*

"Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va. L. Rev. 715 (1983).

In short, appellant's Jurisdictional Statement presents no new issues that have not already been resolved uniformly against appellant's contentions by the lower courts or which compel plenary consideration by this Court. The District Court's resolution of the issues presented is so imminently correct and so consistent with the holdings of all other courts which have considered the same issues as to warrant summary affirmance by this Court.

III. THERE IS NO BASIS FOR APPELLANT'S ARGUMENT THAT AMENDED SECTION 2 INCORPORATES AN INTENT STANDARD.

Appellant's argument that Congress, in enacting the 1982 amendment to Section 2, "did not intend to alter the usual constitutional standard requiring a demonstration of intent" (Jurisdictional Statement, p. 12) manifestly fails to present a substantial question.

The District Court properly held, consistent with the statutory language, statutory purpose, and legislative history of the statute, that: "The amendment to Section 2 was designed to eliminate the requirement, prescribed in *City of Mobile* v. *Bolden*, 446 U.S. 55, 100 S.Ct. 2332 (1980), that a plaintiff demonstrate intentional discrimination to establish a violation of Section 2." App. A, *infra*, p. 6a. Appellant's argument to the contrary, the District Court properly found, was "meritless" and "counter to the plain language of amended § 2, its legislative history, and judicial and scholarly interpretation." *Id.*, pp. 6a-7a n. 5. The Court of Appeals for the Fifth Circuit, in reviewing an argument identical to the one made by appellant here, held that the intent interpretation "asks us to find that Congress meant to adopt a standard exactly opposite to the one explicitly set forth by the statute." *Jones* v. *City of Lubbock*, *supra*, 727

F.2d at 375. The Courts of Appeals—and all other courts which have considered this issue—are unanimous that the congressional purpose behind the 1982 amendment to Section 2 was to eliminate the requirement of proving discriminatory intent. *United States* v. *Marengo County Commission*, *supra*, slip op. at 3134-35 (11th Cir. 1984); *Valesquez* v. *City of Abilene*, 725 F.2d 1017, 1021-23 (5th Cir. 1984); *Buchanan* v. *City of Jackson*, 708 F.2d 1066, 1071-72 (6th Cir. 1983); *Major* v. *Treen*, *supra*, 574 F. Supp. at 341-42, 349-50; *Rybicki* v. *State Board of Elections*, 574 F. Supp. 1147, 1148-49 (N.D. Ill. 1983) (three-judge court).

The statutory language of the amended Section 2 on its face prohibits any voting practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or language minority status as defined in Section 4(f)(2) of the Act. A violation is established if "based on the totality of the circumstances" the protected minority proves that "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The absence of minority elected officials "is one circumstance which may be considered," but the section explicitly disclaims any "right to have members of a protected class elected in numbers equal to their proportion in the population." The section thus explicitly incorporates a "results" test, and there is no requirement of proving a discrminatory intent.[9]

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[9] The legislative history of the statute lists the evidentiary factors which may be used to show that minority voters "do not have an equal opportunity to participate in the political processes and to elect candidates of their choice" (S. Rep. No. 97-417, *supra*, p. 28). These include: (1) a past history of racial discrimination affecting the right to vote; (2) racially-polarized voting; (3) the use of discriminatory electoral devices, such as unusually large districts, majority vote requirements, and anti-single shot voting prohibitions; (4) racial discrimination in slating of candidates;

The House Report explains that the purpose of the Section 2 amendment was "to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision." H.R. Rep. No. 97-227, *supra*, p. 29. The Senate Report also states this purpose: "S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [which] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. No. 97-417, *supra*, p. 2. Senator Dole, upon whose statements appellant places heavy reliance and who struck the "Dole compromise" which secured Senate passage of the statute and the support of the President, stated that one of his "key objectives" was to

> make it unequivocally clear that plaintiffs may base a violation of Section 2 on a showing of discriminatory "results", in which case proof of discriminatory intent or purpose would be neither required, nor relevant. I was convinced of the inappropriateness of an "intent standard" as the sole means of establishing a voting rights claim, as were the majority of my colleagues on the Committee.

S. Rep. No. 97-417, *supra*, p. 193 (additional views of Senator Dole.[10]

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(5) socioeconomic disparities which hinder minorities' ability to participate effectively in the political process; (6) racial appeals in campaigning; and (7) the extent to which minorities have been elected to office. Additional factors which may have some probative value are the unresponsiveness of elected officials to the needs and interests of minority citizens and whether the state policy behind the challenged practice is "tenuous." *Id.*, pp. 28-29; see District Court opinion, App. A, *infra*, pp. 7a-8a.

[10] Senator Dole's remarks also make it clear that the Senate Judiciary Committee rejected appellant's view that Congress in enacting this amendment merely intended to ease minority voters' burden of proving discriminatory intent by allowing the use of "circumstantial evidence of intent" (Jurisdictional Statement, pp. 12, 22). S. Rep. No. 97-417, *supra*, pp. 194-95. See also, *id.* at 28 n. 111.

Appellant argues that (1) because Congress borrowed heavily from this Court's language in *White* v. *Regester*, 412 U.S. 755, 766 (1973), and (2) because the evidentiary factors which may be used to prove a violation (listed in the District Court's opinion, App. A, pp. 7a-8a) come from the *White* decision and its progeny, especially *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), and (3) because this Court in *City of Mobile* v. *Bolden* construed *White* v. *Regester* to require proof of discriminatory intent, then—contrary to all indications—(4) the amendment actually incorporates an intent standard.

This strained interpretation, however, violates the express statutory language and clear legislative history and has been universally rejected by the lower courts. E.g., *United States* v. *Marengo County Commission*, *supra*, p. 3135 n.29; *Jones* v. *City of Lubbock*, *supra*, 727 F.2d at 379-80; *Gingles* v. *Edmisten*, *supra*, slip op. at 12-19 and n.11.

The issue is not what construction this Court put on *White* v. *Regester* in its subsequent opinions, but—as appellant itself recognizes (Jurisdictional Statement, p. 12)—the issue is what Congress intended. And on this issue, as the Eleventh Circuit recently noted, "[t]he statute and the committee reports . . . could not be clearer." *United States* v. *Marengo County Commission*, *supra*, slip op. at 3135 n.29. Congress in enacting this amendment explicitly stated its understanding of *White* and *Zimmer* as incorporating a "results" test and indicated its intent that courts were to construe the borrowed language as prohibiting voting practices which had a discriminatory "result." H.R. Rep. No. 97-227, *supra*, pp. 29-30 ("By amending Section 2 of the Act Congress intends to restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or

electoral practice rather than the intent or motivation behind it."); S. Rep. No. 97-417, *supra*, p. 28 ("The Committee has concluded that *White*, and the decisions following it made no finding and required no proof as to the motivation or purpose behind the practice or structure in question.").[11] See also, Hartman, *Racial Vote Dilution*, *supra*, 50 Geo. Wash. L. Rev. at 725-26.[12]

In advancing this contorted interpretation, appellant simply reiterates the arguments made by those who opposed the passage of this legislation, whose position was decisively rejected by overwhelming votes in both houses of Congress. The argument was fully considered and determined to be "meritless" by the District Court, and that decision is so manifestly correct that it should be summarily affirmed.

IV. APPELLANT'S ARGUMENT THAT THE 1982 AMENDMENT TO SECTION 2 EXCEEDS THE ENFORCEMENT POWERS OF CONGRESS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS FAILS TO PRESENT A SUBSTANTIAL QUESTION.

Appellant's argument that Congress lacks the power under the Fourteenth and Fifteenth Amendments to pro-

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[11] Congressman Sensenbrenner, one of the House Subcommittee members and a leader in the House debates, also made this clear during the House floor debate:

> Let there be no question then. We are writing into law our understanding of the test in White against Regester. And our understanding is that this looks only to the results of a challenged law, in the totality of the circumstances—with no requirement of proving purpose.

128 Cong. Rec. H3841 (daily ed. June 23, 1982). See also, 128 Cong. Rec. S7095 (daily ed. June 18, 1982) (remarks of Senator Kennedy).

[12] Appellant also suggests that an intent interpretation of the statute is necessary to save it from a constitutional challenge of "void for vagueness." Jurisdictional Statement, pp. 14-17. But this argument, also, is totally without merit. See *Jones* v. *City of Lubbock*, *supra*, 727 F.2d at 372-73.

hibit voting practices which have a discriminatory result (Jurisdictional Statement, pp. 22-27) does not merit plenary review by this court.[13]

In enacting the 1982 amendment to Section 2, Congress invoked its power under the Fourteenth and Fifteenth Amendments "to enact appropriate legislation to enforce the rights protected by those amendments." S. Rep. No. 97-417, *supra*, p. 39 (footnote omitted). The Enforcement Clauses of those amendments give Congress the power "to enforce" those amendments "by ap-

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[13] Appellant also contends (Jurisdictional Statement, pp. 6-9) that Section 2 cannot be contrued to cover voting practices which dilute minority voting strength, and must be limited exclusively to governmental actions relating to registration and voting. The apparent reasoning behind this argument is that the scope of Section 2 cannot be greater than that of the Fifteenth Amendment, and a plurality of this Court held in *City of Mobile* v. *Bolden* that the Fifteenth Amendment guarantees nothing more than the right to register and vote free from racial discrimination.

This argument fails to present a substantial question. First, appellant is wrong; a majority of the Court in *Bolden* did conclude that the Fifteenth Amendment, as well as the Fourteenth, protects not only against denial of the right to vote but also against vote dilution. See *Lodge* v. *Buxton*, 639 F.2d 1358, 1372-73 (5th Cir. 1981), *aff'd sub nom. Rogers* v. *Lodge*, 458 U.S. 613 (1982). Second, appellant throughout its Jurisdictional Statement ignores the Fourteenth Amendment, which clearly prohibits discriminatory vote dilution. *Rogers*, *supra*. Third, Congress in exercising its constitutional enforcement power, discussed *infra*, clearly intended that Section 2 should cover discriminatory districting plans. H.R. Rep. No. 97-227, *supra*, pp. 30-31; S. Rep. No. 97-417, *supra*, pp. 28-30. As the Eleventh Circuit has ruled, "This argument is wholly without merit." *United States* v. *Marengo County Commission*, *supra*, slip op. at 3124.

Appellant also contends that Section 5 of the Voting Rights Act is inapplicable to redistricting cases involving vote dilution (Jurisdictional Statement, pp. 6-9). On its face, this is nothing more than an attempt to relitigate all of this Court's Section 5 decisions from *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), to *McCain* v. *Lybrand*, 52 U.S.L.W. 4195 (U.S. Feb. 21, 1984) (No. 82-282), and presents no new issues.

propriate legislation." U.S. Const., amend. XIV, § 5; amend. XV, § 2. The District Court properly concluded (App. A, p. 7a) that Section 2 is a constitutional exercise of this enforcement power.

Congress has broad enforcement powers under the Fourteenth and Fifteenth Amendments. As Chief Justice Burger wrote in *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980) (plurality opinion):

> Here we deal . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees.

This legislation was not enacted until there had been extensive congressional hearings and debate on the need for further amendments to the Voting Rights Act. There was extensive evidence before Congress in 1981 and 1982 which was detailed in the House hearings (18 days of hearings, including regional hearings in Alabama and Texas, and the testimony of 156 witnesses) and Senate hearings (nine days of subcommittee hearings) and summarized in the committee reports that, despite the fact that the Voting Rights Act had been in effect for more than 15 years, there was widespread, continuing racial discrimination affecting the right to register and vote. See H.R. Rep. No. 97-227, *supra*, pp. 13-21; S. Rep. No. 97-417, *supra*, pp. 9-15; cf. Report of United States Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* (1981). There was thus an ample basis for Congress to conclude that Fourteenth and Fifteenth Amendment violations were continuing and were not being redressed by existing legislation.

In *City of Mobile* v. *Bolden*, *supra*, this Court held that the Fourteenth and Fifteenth Amendments require

proof of discriminatory purpose. This Court, however, repeatedly has held that Congress has the power, under the Enforcement Clauses of these amendments, to enact legislation which goes beyond the specific prohibitions of those amendments so long as that legislation is appropriate to fulfill the purpose of those constitutional amendments. *City of Rome* v. *United States*, 446 U.S. 156 (1980); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966) ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.").[14]

Accordingly, this Court repeatedly has sustained the constitutionality of congressional legislation prohibiting voting practices which have a discriminatory effect without proof of dscriminatory purpose. In *South Carolina* v. *Katzenbach* the Court sustained the constitutionality of Section 5 of the Voting Rights Act, which requires that covered localities with a history of discrimination preclear all voting law changes with the Attorney General or the D.C. District Court and demonstrate that those changes are not discriminatory in purpose or effect.[15]

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[14] The proper standard for assessing the congressional enforcement power was recently set out by this Court in *City of Rome* v. *United States*, *supra*, 446 U.S. at 175 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)):

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

[15] To sustain the constitutionality of Section 2, there is no need to demonstrate the existence of "exceptional conditions" (*Katzenbach* v. *South Carolina*, *supra*, 383 U.S. at 334) which were necessary to the validity of Section 5. The 1982 amendment to Section 2 is not the "uncommon exercise of congressional power" (*id.*) that

In *Katzenbach* v. *Morgan* the Court upheld a nationwide prohibition on the use of literary tests for persons who had completed a sixth-grade education in a foreign language "American flag" school. In *Oregon* v. *Mitchell* the Court unanimously sustained a nationwide five-year ban on the use of literacy tests.

Most recently, in *City of Rome* v. *United States* the Court once again sustained the constitutionality of Section 5's prohibition on any voting change which has a racially discriminatory "effect," rejecting an argument similar to the one made here that the Section 5 "effect" test is unconstitutional because it exceeds Congress's power to enforce the Fifteenth Amendment, which prohibits only purposeful discrimination. 446 U.S. at 173-78. These prior decisions, the Court held, demonstrate that, "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *Id.* at 173. These prior decisions make clear, the Court ruled, that Congress has the authority to prohibit discriminatory practices, which are not themselves violative of the Fourteenth or Fifteenth Amendments, which "perpetuate[] the effects of past discrimination" or "create the risk of purposeful discrimination." *Id.* at 176, 177.

These decisions sustaining the scope of Congress's power to enforce the Fourteenth and Fifteenth Amendments are controlling here. See Hartman, *Racial Vote Dilution*, *supra*, 50 Geo. Wash. L. Rev. at 739-52. Congress found "that to enforce fully the Fourteenth and

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Section 5 is. Section 2, unlike Section 5, does not impose an absolute ban on election law changes pending Federal preclearance, and its coverage is nationwide, and not limited to particular states and jurisdictions. Nor does Section 2, unlike Section 5, place the burden of proof on the challenged jurisdiction to prove the absence of a discriminatory purpose of effect. Thus, there is no "overinclusion problem" referred to by appellant (p. 24). See *Major* v. *Treen*, *supra*, 574 F. Supp. at 348.

Fifteenth Amendments, it is necessary that Section 2 ban election procedures and practices that result in a denial or abridgement of the right to vote." S. Rep. No. 97-417, *supra*, p. 40. In support of this conclusion Congress expressly found (*id.*):

> (1) that the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for Section 2 is adopted, and (2) that voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination.

Under the controlling decisions of this Court, these findings fully support and sustain the constitutionality of the 1982 amendment to Section 2. See *United States* v. *Marengo County Commission*, *supra*, slip op. at 3127-33; *Jones* v. *City of Lubbock*, *supra*, 727 F.2d at 373-75; *Major* v. *Treen*, *supra*, 574 F. Supp. at 346-49.

Appellant admits that Congress has substantial power to enforce the Fourteenth and Fifteenth Amendments, but misconstrues the District Court's decision to hold that it "necessarily recognized the power of Congress to create constitutional rights where none had previously existed" (Jurisdictional Statement, p. 24). Appellant's argument completely misses the mark. Congress has made no attempt to redefine the meaning of the Fourteenth and Fifteenth Amendments by statute, but rather has simply enforced their provisions. As the Senate Judiciary Committee noted:

> The proposed amendment to Section 2 is well within Congress' constitutional authority. It is not an effort to overrule a Supreme Court interpretation of the Constitution, rather it provides a statutory prohibition which Congress finds is necessary to enforce the

substantive provisions of the 14th and 15th Amendments.

S. Rep. No. 97-417, *supra*, pp. 16-17; see also, *id.* at 40-41.

For case law in support of its argument, appellant relies upon that portion of this Court's decision in *Oregon* v. *Mitchell* which invalidated a congressional statute lowering the voting age to 18 in state elections. But that holding is completely inapplicable here, and the contrast between the two cases shows that appellant's argument is completely without merit. The Court recognized that Congress's enforcement powers under the Civil War Amendments was broad, but invalidated the change in voting age specifically because "Congress made no legislative findings that the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race." 400 U.S. at 130 (opinion of Black, J.); accord, 400 U.S. at 212-13 (opinion of Harlan, J.); 400 U.S. at 296 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.) ("The state laws that it invalidates do not invidiously discriminate against any discrete and insular minority."). See *Jones* v. *City of Lubbock*, *supra*, 727 F.2d at 374.

The necessary congressional findings which were absent in *Oregon* v. *Mitchell* are present here—Congress has found that voting laws with a racially discriminatory result have been used for purposeful discrimination (which may remain undetected because of the difficulties of proving discriminatory intent, see S. Rep. No. 97-417, *supra*, pp. 36-37) and perpetuate the effects of past purposeful discrimination.[16] In amending Section 2

[16] Contrary to appellant's argument (Jurisdictional Statement, pp. 25-26), it is not necessary for the enforcement of this legislation here to show that the redistricting plan struck down by the District Court was used for purposeful discrimination or that it perpetuated past purposeful discrimination in the individual case. See *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 649. The sole role for the Court is to determine whether there is a rational basis for the congressional judgment prohibiting voting practices which have a discriminatory result. *Id.* at 652-56. Nevertheless, here the District Court did determine that the 1982 court-ordered plan perpetuated black political impotence caused, in part, by Mississippi's history of purposeful discrimination in voting. App. A, p. 11a.

Congress has not expanded the Constitution's substantive guarantees but has simply redefined and strengthened the statutory protections around core constitutional values, thus exercising its authority within the confines of the Constitution.

Major v. *Treen*, *supra*, 574 F. Supp. at 347 (footnote omitted). There is thus no basis for appellant's claim that Section 2 exceeds the enforcement authority vested in Congress by the Fourteenth and Fifteenth Amendments, and the District Court's decision sustaining the constitutionality of Section 2 should be affirmed.

CONCLUSION

For the above-stated reasons, and on the basis of the authorities cited, this appeal should be either dismissed or those portions of the District Court's decision sustaining the constitutionality of the 1982 amendment to Section 2 of the Voting Rights Act and applying it to vacate its 1982 court-ordered plan should be affirmed.

Respectfully submitted,

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 I Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 371-1212

ROBERT BRUCE MCDUFF
University of Mississippi
Law School
University, Mississippi 38677
(601) 232-5483

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway Street
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

Attorneys for Owen H. Brooks, et al., Appellees

* Counsel of Record

APPENDICES

APPENDIX A

District Court Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC82-80-WK-0

DAVID JORDAN, *et al.*,
Plaintiffs,

v.

WILLIAM WINTER, *et al.*,
Defendants.

No. GC82-81-WK-0

OWEN H. BROOKS, *et al.*,
Plaintiffs,

v.

WILLIAM F. WINTER, *et al.*,
Defendants.

(April 16, 1984)

ON REMAND FROM THE
UNITED STATES SUPREME COURT

Before CLARK, Chief Circuit Judge; SENTER, Chief District Judge; and KEADY, Senior District Judge.

PER CURIAM:

On June 8, 1982, this court ordered into effect on an interim basis a congressional redistricting plan for the

State of Mississippi. *Jordan v. Winter*, 541 F.Supp. 1135, 1144-45 (N.D. Miss. 1982). On appeal, the United States Supreme Court vacated this court's judgment and remanded the case for further consideration in light of Section 2 of the Voting Rights Act of 1965, —— U.S. ——, 103 S.Ct. 2007 (1983).

This court held an evidentiary hearing in December of 1983. On the basis of the evidence adduced at trial and the pleadings, briefs, and argument of counsel, we concluded that the court-ordered plan, or Simpson Plan, violated amended § 2. The court found that the structure of the Second Congressional District in particular unlawfully diluted black voting strength. Accordingly, on January 6, 1984, we entered judgment directing the use, until the Mississippi Legislature enacts a valid congressional redistricting plan, of an interim plan fashioned by the court with the aid of the parties. Pursuant to the reservation set out in that final judgment, we now enter Findings of Fact and Conclusions of Law in support of that judgment, in conformity with Fed. R. Civ. P. 52(a).

I. *Procedural History*

The history of the legislative and judicial efforts to secure a constitutional congressional redistricting plan for the State of Mississippi is set out in our prior decision in *Jordan v. Winter*, 541 F.Supp. 1135 (N.D. Miss. 1982). Only a brief summary is required here.

The 1980 official census revealed a total population disparity in Mississippi's 1972 congressional districting plan of 17.6%. Recognizing the constitutional problem posed by such malapportionment, *see* U.S. Const. Art 1, § 2; *Reynolds v. Sims*, 377 U.S. 533 (1964), the Mississippi Legislature in 1981 enacted S.B. 2001 [1] for redistricting the state's five congressional districts. The Attorney General of the United States, after reviewing the plan pur-

[1] 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8.

suant to the preclearance provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c,[2] interposed a timely objection on March 30, 1982. The Attorney General found the plan defective because it divided the concentration of black majority counties located in the northwest or "Delta" portion of the state among three districts rather than concentrating them in a single district.[3] He concluded that this configuration constituted an unlawful dilution of minority voting strength.

The Mississippi Legislature did not attempt to enact another plan or otherwise to obtain preclearance from the Attorney General. On April 7, 1982, it filed a declaratory judgment action in the United States District Court for the District of Columbia seeking judicial preclearance of S.B. 2001. *Mississippi v. Smith*, No. 82-0956. That action has since been voluntarily dismissed.

The Jordan and Brooks plaintiffs then filed class actions to enjoin enforcement of S.B. 2001 until it was precleared, to prohibit further use of the 1972 plan because of population malapportionment, and to secure a court-ordered interim plan for the 1982 congressional elections and thereafter until changed by law. A three-judge district court was convened pursuant to 28 U.S.C. § 2284. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1973j(f). This court declined to

[2] Mississippi is a covered jurisdiction under § 5 of the Voting Rights Act, and S.B. 2001 was a change in voting standards, practices, or procedures within the meaning of § 5.

[3] The Mississippi Delta consists of the following counties: Bolivar, Carroll, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Leflore, Panola, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tunica, Warren, Washington, and Yazoo. Mississippi's congressional districting plans from 1882 to 1966 all contained a district encompassing most of the Delta counties. 541 F.Sup. at 1139 and n.2. Maps depicting the congressional districts as they existed under the 1962 plan and under S.B. 2001 are attached. District 2 of the 1962 plan contains most of the Mississippi Delta.

place the unprecleared S.B. 2001 into effect on an interim basis and concluded that the 1972 plan was unconstitutionally malapportioned and therefore also unsuitable for interim use. *Jordan v. Winter*, 541 F.Supp. at 1142. It thus limited its consideration to two plans advocated by the plaintiffs and one advocated by the AFL-CIO as amicus curiae.

Plaintiffs urged the court to order into effect either of two plans devised by Senator Henry J. Kirksey, a black state legislator. Both plans kept the Delta area intact and achieved black majority districts by combining the Delta area with predominantly black portions of Hinds County and the City of Jackson. 541 F.Supp. at 1140. Plaintiffs' preferred plan (Kirksey Plan 1) contained one district that was 64.37% black; the alternative plan (Kirksey Plan 2) contained one district that was 65.81% black. *Id.* The plan urged by the AFL-CIO, the "Simpson Plan," combined fifteen Delta and part-Delta counties with six predominantly white eastern rural counties to produce four majority white districts and one district with a black population majority of 53.77%. *Id.* at 1141. The Kirksey Plan 1 had a total population variance of .2150%; the Kirksey Plan 2 a variance of .230%, and the Simpson plan a variance of .2141%.

The court was bound by *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518 (1982), to fashion an interim plan that adhered to the state's political policies to the extent those policies did not violate the Constitution or the Voting Rights Act. 541 F.Supp. at 1141. The court determinded that the following political policies underlay the passage of S.B. 2001:

> (1) Minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population.

Id. at 1143. Because the Simpson Plan most nearly accorded with the latter three policies, which the court found to be constitutionally and statutorily valid,[4] we ordered it into effect on an interim basis. That plan was used for the 1982 congressional elections. It is depicted on a map appended to our prior decision, *id.* at 1146, and is statistically described as follows:

District	Total Population	Deviation	% Deviation	Black %
1	504,671	+543	+.1077	25.86
2	504,697	+569	+.1128	53.77
3	503,760	−368	−.0729	31.23
4	503,893	−235	−.0466	45.25
5	503,617	−511	−.1013	19.84

Although the Second District under the Simpson Plan was a majority black district (53.77%), it had a minority black voting age population of 48.05%.

Analysis of the Simpson Plan under the standard established is amended § 2 of the Voting Rights Act of 1965 reveals its invalidity.

II. *Amended Section 2*

Section 2 of the Voting Rights Act of 1965, as amended, presently reads:

> Sec. 2(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United

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[4] As to the first policy, the court recognized that the validity of the Attorney General's conclusion that drawing lines for Districts 1, 2, and 3 from east to west unlawfully diluted black voting strength was the primary issue in the proceedings then pending in the District Court of the District of Columbia. It therefore accepted, without indicating any view as to its validity, the Attorney General's conclusion. 541 F.Supp. at 1143.

States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) a violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973 (West Supp. 1983). The amendment to Section 2 was designed to eliminate the requirement, prescribed in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 3222 (1980), that a plaintiff demonstrate intentional discrimintation to establish a violation of section 2.[8]

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[8] S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [which] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2 . . . .

S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Ad. News 177 (hereinafter cited as Senate Report). *See Jones v. City of Lubbock*, No. 83-1196 (5th Cir. Mar. 5, 1984); *Jordan v. City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir. 1983); *Buchanan v. City of Jackson*, 708 F.2d 1066, 1072 (6th Cir. 1983); *Campbell v. Gadsden County School Board*, 691 F.2d 978, 981, n.4 (11th Cir. 1982); *Seamon v. Upham*, CA No. P-81-49-CA (E.D. Tex. 1983); *Major v. Treen*, 574 F.Supp. 325, 342 (E.D. La. 1983); Blumstein, Defining and Proving Race Discrimination: *Perspectives*

We reject the contention of the Republican Defendants that Section 2, if construed to reach discriminatory results, exceeds Congress's enforcement power under the fifteenth amendment. We agree with the analysis and conclusion set out in *Major v. Treen*, 574 F.Supp. 325, 342-349 (E.D. La. 1983) (three judge court), which rejected a similar assult on the constitutionality of Section 2. We therefore adopt that treatment of this issue without repetition here.

The Senate Judiciary Report on the amendment states that the "results" language of new Section 2 was meant to "restore the pre-[*City of Mobile v.*] *Bolden* legal standard which governed cases challenging electoral systems or practices as an illegal dilution of the minority vote." Senate Report at 27. The Report then enumerates the factors courts should consider in deciding whether plaintiffs have established a violation of Section 2. These factors, derived from the Supreme Court's opinion in *White v. Regester*, 412 U.S. 755 (1973), as applied in this Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub. nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), include, but are not limited to:

> 1. The extent of any history of official discrimination in the state or political subdivisiton that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

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on the Purpose v. Results Approach from the Voting Rights Act, 69 Va. L. Rev. 633, 689-70 (1983); Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 726 (1982).

The Republican Defendants have argued that amended Section 2 preserves the requirement of proving discriminatory intent. We find this argument to be meritless as it runs counter to the plain language of amended § 2, its legislative history, and judicial and scholarly interpretation.

2. The extent to which voting is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report at 28-29 (footnotes omitted). The Report also cites for consideration, as additional factors probative of a violation of Section 2: (1) whether elected officials are unresponsive to the needs of minority group members; and (2) whether the policy underlying the challenged procedure is "tenuous." *Id.* at 29. No particular number of these factors need be proved. *Id.*

III. *Amended Section 2 and the Simpson Plan*

The court finds that the aggregate of the following factors shows that the Simpson Plan unlawfully dilutes minority voting strength.

A. *Past Discrimination*

That Mississippi has a long history of de jure and de facto race discrimination is not contested. That history

has been often recounted in judicial decisions[6] and includes the use of such discriminatory devices as poll taxes, literacy tests, residency requirements, white primaries, and the use of violence to intimidate blacks from registering for the vote. The State is a covered jurisdiction under the Voting Rights Act of 1965. The Attorney General has designated 42 of the counties in Mississippi for federal registrar enforcement of the right to vote.

We find that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout. Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

The evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi.[7] Blacks in Mississippi,

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[6] *See, e.g., United States v. Mississippi*, 380 U.S. 128 (1965); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 144 (5th Cir. 1977); *Moore v. Leflore County Board of Election Commissioners*, 502 F.2d 621, 624 (5th Cir. 1974), *aff'g* 361 F.Supp. 603, 605 (N.D. Miss. 1972), *Mississippi v. United States*, 490 F.Supp. 569, 575 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

[7] The courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimnation tend to depress minority political participation, e.g. *White* [*v. Regester*], 412 U.S. at 768; *Kirksey v. Board of Supervisors*, 554 F.2d 139, 145 [(5th Cir. 1977)]. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Senate Report No. 417, 97th Congress, 2d Sess. at 29, n.114.

especially in its Delta region, generally have less education, lower incomes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. *See* United States Commission on Civil Rights, *Voting in Mississippi*, pp. 3-4 (1965). Census statistics indicate lingering effects of this past discrimination: the median family income in the Delta Region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing.

B. *Racial Bloc Voting*

Plaintiffs have established that voters in Mississippi have previously voted and continue to vote on the basis of the race of candidates for elective office. The state defendants had conceded as much prior to the 1982 elections, but attempted to show at trial that the 1982 campaign in the Second District was not characterized by racial bloc voting. The evidence defendants presented was that the black Democratic candidate, Robert Clark, received approximately 15% of the white vote in the 1982 general election and that Clark won the Democratic nomination in a primary contest against white opponents. The primary election in the Second District conducted under our prior plan was characterized by confusion and low voter turnout due to a variety of factors, including uncertainty about election dates, the recent realignment of the district, and the lack of an incumbent. The race was additionally atypical because of a court order allowing Republican voters to participate in the Democratic primary. Clark's victory in the primary was followed by defeat in the general election—a defeat we find was caused in part by racial bloc voting. Plaintiffs'

proof, also based on analysis of these election returns, demonstrated a consistently high degree of racially polarized voting in the 1982 election and previous elections. From all of the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race. We therefore find racial bloc voting operates to dilute black voting strength in Congressional districts where blacks constitute a minority of the voting age population. Since the Second District under the Simpson Plan does not have a majority black voting age population, the presence of racial bloc voting in that district inhibits black voters from participating on an equal basis with white voters in electing representatives of their choice. As the Supreme Court held in *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S.Ct. 3272, 3279 (1982):

> Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race.

C. *The State Policies Underlying the Simpson Plan*

This court previously adopted the Simpson Plan for interim use primarily because it conformed to the State legislature's policy of favoring the division of the black population of the State into two "high impact" districts rather than concentrating it into one district. 541 F.Supp. at 1143-44. The results test required by Section 2 precludes dependence on this policy. The combination of six predominantly white eastern counties with the Delta region's black population, when considered in light of the effects of past discrimination on black efforts to participate in political affairs and the existence of racially polarized voting, operated to minimize, cancel, or dilute black voting strength in the Second District. *Kirksey v. Board of Supervisors*, 554 F.2d at 150; *see*

Major v. Treen, 574 F.Supp. at 354; Hartman, *Racial Vote Dilution and Separation of Powers; An Exploration of the Judicial "Intent" and the Legislative "Results" Standards*, 50 Geo. Wash. L. Rev. 689, 695 (1982). Our previous opinion relied on *United States v. Forrest County Board of Supervisors*, 571 F.2d 951 (5th Cir. 1978), and *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981). Neither involved evidence of racial bloc voting. They are no longer apposite.

D. *Other Factors*

Plaintiffs produced other persuasive evidence that the political processes in Mississippi were not equally open to blacks. Evidence of racial campaign tactics used during the 1982 election in the Second District supports the conclusion that Mississippi voters are urged to cast their ballots according to race.[8] This inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts.

IV. *The Court-Ordered Interim Plan*

In devising a plan to replace our prior plan for the impending election, we recognized the obligation to: (1) achieve the least possible deviation from the one person, one vote ideal, *Chapman v. Meier*, 420 U.S. 1, 26-27, 95

[8] One campaign television commercial sponsored by the white candidate whose slogan was "He's one of us" opened and closed with a view of Confederate monuments accompanied by this audio message:

> You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations.

S.Ct. 751, 765-66 (1975); (2) design a plan that is not racially discriminatory in either purpose or effect, *McDaniel v. Sanchez*, 452 U.S. 130, 148, 101 S.Ct. 2224, 2235 (1981); and (3) adhere to the state's policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act, *Upham v. Seamon*, 456 U.S. 37, 102 S.Ct. 1518, 1520-21 (1982).

The plan ordered into effect by our final judgment of January 6, 1984, meets these requirements. The statistics of that plan are set out below.

Congressional District	Total Population	Percent Variance From the Norm	Black Population	% Black	Total Voting Age Pop. (VAP)	Black VAP	% Black VAP
1	504,977	—.0101%	124,136	24.63%	346,074	74,185	21.43%
2	504,624	—.0806%	293,538	58.20%	322,719	179,491	55.62%
3	504,242	+.0326%	161,719	32.07%	343,524	95,478	28.26%
4	504,187	+.0117%	211,714	41.99%	346,379	129,618	37.42%
5	504,198	—.0048%	95,899	19.01%	342,754	57,668	16.65%
		Range .0432					

The interim plan was constructed under these criteria: create a rural Delta-River area district with a black voting age population majority; achieve minimal deviation from the ideal population per congressional district of 504,128; create districts containing voters with similar interests; preserve the electoral base of incumbents; and comply with the legislative goal of achieving high impact districts without splintering cohesive black populations.

We recognize that the creation of a Delta district with a majority black voting age population implicates difficult issues concerning the fair allocation of political power. *See* A. Howard & B. Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 Colum. L. Rev. 1615 (1983). Although the use of a race-conscious remedy for discrimination, approved by the Supreme Court in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), can

come into tension with Congress' disclaimer in amended § 2 of any right to proportional representation, the plan we have adopted fully rectifies the dilution of black voting strength in the Second District and satisfies the requirements of amended § 2 without achieving proportional representation for blacks in Mississippi.

The court rejected alternative plans offered by plaintiffs which would achieve a significantly higher black voting age population (approximately 60%) in the Second District. Plaintiffs argue that a black voting age population of such preponderance is required for blacks to elect representatives of their choice. Amended § 2, however, does not guarantee or insure desired results, and it goes no further than to afford black citizens an equal opportunity to participate in the political process. In commenting upon the § 2 amendment, Senator Dole, a leading sponsor of the compromise legislation, stated: "Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." Senate Report at 193. In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections. Credible expert testimony received in this case supports this conclusion. Additionally, plaintiffs' plans are an obvious racial gerrymander which would bring into the Second District overwhelmingly black sections of the City of Jackson and its suburbs; these inner-city, metropolitan areas have little in common with the interests of the predominantly rural Delta region. Also, plaintiffs' plans unnecessarily dilute black voting strength in the Fourth District. The Fourth District presently has a black population of 45.25%. The evidence presented indicates this is a factor in making the Fourth District representative reasonably receptive and sensitive to the needs of the black community. The plan adopted necessarily reduces the black population of the Fourth District to 41.99%. To further reduce the black population in the Fourth District to 33.7 or 33.83% as proposed by plaintiffs (541 F.Supp. at 1140) would diminish the impact of black voters in that district. Although the plans propozed by plaintiffs would probably insure the election of a black congressman in the Second District, the attempt to gain this election guaranty, which § 2(b) expressly disclaims, would have a certain adverse effect on the impact of the black voters in the Fourth District. Because of these considerations, we conclude that a black voting age population majority of 52.83% achieved under the court's plan will remedy the defect we now perceive in the Simpson Plan under the amended § 2.

We are cognizant that our court-ordered interim plan does not provide a compact geographical configuration for the Second District. However, it consists of rural Delta and river counties with similarities of interest; avoids gerrymandering a substantial portion of metropolitan Jackson into a district with these rural or farm counties; and yields the least adverse impact on the black voting influence in the Fourth District.

A specific description of the five congressional districts as established in our final judgment of January 6, 1984, and map outlining these districts, are attached.

/s/ C.C.

/s/ L.T.S. Jr.

/s/ W.C.K.

[Maps and attachments deleted]

APPENDIX B

Consent Order of April 29, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC82-80-WK-0
(Three Judge Court)

DAVID JORDAN, *et al.*,
Plaintiffs,

v.

WILLIAM WINTER, *et al.*,
Defendants.

(Consolidated with)

No. GC82-81-WK-0
(Three Judge Court)

OWEN H. BROOKS, *et al.*,
Plaintiffs,

v.

WILLIAM F. WINTER, *et al.*,
Defendants.

CONSENT ORDER

Defendants, Mississippi Republican Party Executive Committee and Mississippi Democratic Party Executive Committee, having entered appearance in this cause and having by pleadings consented to the entry of judgment in this case as respects redistricting as litigated to conclusion by the remaining parties and as ordered by the Court, and said defendants having moved the Court to be

relieved from the necessity of further pleadings and proceedings in this case, IT IS ORDERED as follows:

That defendants, Mississippi Republican Party Executive Committee and Mississippi Democratic Party Executive Committee, are relieved from the necessity of all further pleadings and appearances before this Court;

That said defendants have no discretion in the matter of districting for purposes of the elections for United States Representative and no relief thereasto is appropriate as against them, but said defendants will be bound by all orders of this Court in respect thereof;

That liaison counsel for the defendants is ordered to serve upon counsel for said defendants copies of all pleadings and orders of substantive effect so that said defendants may take part in any ancillary proceedings wherein their interests are affected, otherwise to take no further part in this litigation; and

That no costs are taxed as against defendants, Mississippi Republican Party Executive Committee and Mississippi Democratic Party Executive Committee.

SO ORDERED this the 29th day of April, 1982.

FOR THE COURT

/s/ William C. Keady
United States District Court

AGREED TO ENTRY:

/s/ Danny E. Cupit
DANNY E. CUPIT
Counsel
Mississippi Democratic Party
Executive Committee

/s/ Michael S. Allred
MICHAEL S. ALLRED
Counsel
Mississippi Republican Party
Executive Committee

REPLY

BRIEF

No. 83-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,
Appellants

v.

OWEN H. BROOKS, et al., Appellees

On Appeal from the United States District Court for the Northern District of Mississippi

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

*Michael B. Wallace

JONES, MOCKBEE & BASS
1080 Flynt Drive, Suite E
P. O. Box 55507
Jackson, Mississippi 39216
Tel. (601) 939-3895

Attorneys for Mississippi
Republican Executive Committee,
Appellants

* *Counsel of Record*

18 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

This brief is filed, pursuant to this Court's Rule 16.5, as a reply to the Motion to Dismiss or Affirm previously filed in this cause by the Appellees, Owen H. Brooks, et al., hereinafter referred to as "the Brooks Plaintiffs".

I. THE REPUBLICAN APPELLANTS HAVE STANDING TO RAISE ANY DEFENSE TO THIS ACTION.

The Brooks Plaintiffs raise the novel contention that the Republican Appellants lack standing to defend themselves in this action. Brooks Mtn. at 10-13. The cited cases do not support that contention. Each of them deals with the standing of a plaintiff to invoke a court's coercive power against a defendant. There is no case which restricts the standing of a defendant to protect himself against that same coercive power.

The Brooks Plaintiffs quote a fragment of a sentence from *Gladstone, Realtors, v. Village of Bellwood*, 441 U.S. 91, 99 (1979), taken out of context. Brooks Mtn. at 10. The full sentence reads, "In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." See also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The Executive Committee of the Mississippi Republican Party is not the plaintiff in this case.

They seek no more than to protect themselves and all Mississippi voters from the misappropriation of this Court's authority by the Plaintiffs who seek to effectuate an erroneous and unconstitutional interpretation of a federal statute.

If the Brooks Plaintiffs' assertion that the Republican Executive Committee "is a mere stakeholder in this controversy," Brooks Mtn. at 7, is true, it is even more true as to the Defendant members of the State Board of Election Commissioners, because they have even less authority over the conduct of general elections than the Republican Appellants have over their own primary.[1] Nevertheless, this Court has already held that the Election Commissioners are appropriate defendants in cases seeking to protect the right to vote because of their personal interests in enforcing the election laws of the State. *United States v. Mississippi*, 380 U.S. 128, 141-42 (1965). Because of their greater discretionary authority in the election process, the Republican Appellants have an even greater personal interest in the defense of this action. Indeed, if the Brooks Plaintiffs are serious in their contention that "there is no justiciable case or controversy involving the Mississippi Republican Executive Committee," Brooks Mtn. at 7, it must necessarily be concluded that no controversy exists in this case. This Court's course of action under those circumstances is not to dismiss the appeal, but to vacate the Judgment and instruct the District Court to dismiss the complaint for lack of a justiciable case or controversy.

Even if the Brooks Plaintiffs had not named the Mississippi Republican Executive Committee as Defendants, they would have had the right to intervene to protect the interests of Republican voters. The Republican Appellants have been chosen to represent those interests by the electors of the State of Mississippi. Miss. Code Ann. §23-1-3 (Supp. 1983). They have at least as much standing to represent the interests of a segment of the electorate as do the Plaintiffs, who have been elected by no one to represent the interests of black voters.[2]

[1] The only function of the Board is the appointment of county voter registrars. Miss. Code Ann. §23-5-7 (1972). The Party Executive Committees, on the other hand, are charged with the duty of adopting rules and regulations to ensure a fair primary. Miss. Code §3108.5 (1942) (still in effect because the repealing act was never approved under Section 5 of the Voting Rights Act and was itself subsequently repealed). The State Party, acting through its convention, has the authority to draft a statement of principles to which electors must adhere before being permitted to vote in party primaries. Miss. Code §3129 (1942).

[2] Thus, contrary to the assertions of the Brooks Plaintiffs, Brooks Mtn. at 12, the Republican Appellants have more right to represent the interests of Republican candidates for Congress than do the Plaintiffs to represent black candidates. *Georgia Socialist Workers Party v. Fortson*, 315 F. Supp. 1035, 1036-37 (N.D. Ga. 1970), aff'd sub nom. *Jenness v. Fortson*, 403 U.S. 431 (1971). See *NAACP v. Patterson ex rel. Alabama*, 357 U.S. 449, 458-60 (1958).

The Republican voters themselves clearly have a right to have their interests represented in this proceeding. Neither Section 2 nor Section 5 protects racial groups as such.[3] Section 2 speaks of "the right of any citizen," and Section 5 provides that "no person shall be denied the right to vote."[4] Any Republican of any race has the right to be heard to protect his exercise of his franchise. Where a court fashions relief based upon an improper construction of Section 2, any citizen has a right to be heard in opposition. A court cannot grant relief to one citizen under Section 2 without affecting the legitimate interests of other citizens. Republican citizens have every interest in seeing that electoral systems are not improperly disturbed. In short, the Voting Rights Act is not the private property of self-appointed class action plaintiffs.

II. NEITHER THE CONSENT ORDER OF APRIL 29, 1982, NOR THE REPUBLICAN APPELLANTS' ORIGINAL ANSWER DEPRIVES THIS COURT OF JURISDICTION ON APPEAL.

The District Court's Order of April 29, 1982, relieved the Republican Appellants "from the necessity of all further pleadings and appearances before this Court." Brooks Mtn. at 17a. However, contrary to the contentions of the Brooks Plaintiffs, that Order did not preclude the Republican Appellants from the right of pleading and appearing before the District Court or this Court. The continued interest of the Republican Appellants is established by the Order itself which explicitly provided that they "may take part in any ancillary proceedings wherein their interests are affected." *Id.*

The Republican Appellants found their interests affected after this Court's vacation of the District Court's 1982 remedial Order. The argument of the Brooks Plaintiffs that the Republican Appellants took no active part in discovery or trial, *id.*, at 9, simply is not borne out by the facts. Counsel for the

In fact, of course, both parties are really representing voters. As Judge Scalia has said, Members of Congress "have a private right to the office itself, ... but the powers of the office belong to the people and not to them." *Moore v. United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result).

[3] Thus, contrary to the Brooks Plaintiffs' speculation, Brooks Mtn. at 12-13, the Republican Appellants need not claim to represent white voters in the Second District, because several of them are such voters. Others are black voters in the other districts, who may clearly complain that the District Court's Judgment discriminates against them. Memorandum of Appellees, Mississippi Republican Executive Committee, in Oposition to Jurisdictional Statement at 16-19, *Brooks v. Allain*, No. 83-1865 [hereinafter cited as Republican Mem.]. Certainly, these individual Committee members have sustained injury in fact sufficient to satisfy Article III. *United Jewish Organizations of Williamsburgh, Inc., v. Wilson*, 510 F.2d 512, 520-22 (2d Cir. 1975), aff'd, 430 U.S. 144 (1977).

Republican Appellants attended the District Court's first status conference in September of 1983 and appeared at several of the depositions, see, e.g., Ex. P-31, and at the trial itself. The Republican Appellants filed a pre-trial brief and participated in oral argument at the end of the case. Tr. 8, 495. Counsel for the Republican Appellants participated in the consultations with the District Court leading to the remedial Judgment of January 6, 1984. Having actively participated in the proceedings leading to the District Court's Judgment, they are not barred by the Consent Order of April 29, 1982, from seeking relief from that Judgment.

It is undeniable that the original answer of the Republican Appellants consented to the entry of judgment on the basis of the original complaint in this case. It is equally undeniable that the original complaint could not support the entry of the Judgment entered by this Court on January 6, 1984. Neither complaint alleged a violation of Section 2 of the Voting Rights Act as it then existed, much less a violation of the amended version. If the Brooks Plaintiffs are serious about wishing to have this case resolved on the original pleadings, the Republican Appellants will be happy to have the District Court's Order of June 8, 1982, reinstated.

Neither any of the Plaintiffs nor any of the Defendants amended their pleadings after this Court remanded the case for reconsideration under the amended version of Section 2. The District Court's order of September 26, 1983, severely limited the pleadings which would be permitted on remand:

> Plaintiffs are directed to file within twenty (20) days from this date written objections to the Simpson plan, specifying in what particulars and on what grounds the redistricting plan offends new §2 of the Voting Rights Act. Defendants shall have ten (10) days from receipt of objections to make written specific responses thereto. No further pleadings in the Brooks case shall be allowed.

See Appendix, *infra*. The Plaintiffs, then, were "directed" to file objections. The Defendants were permitted, not directed, to file responses. The State Defendants filed answers to the Brooks Plainiffs' objections and specifically raised the unconstitutionality of the amended version of Section 2.

Under the District Court's order of April 29, 1982, the

[4] Indeed, the District Court's decision to withdraw the issue of Congressional redistricting from the elected legislature imposes "a 'voting qualification' of the most drastic kind. While under the old regime all registered voters could cast a ballot, now none are qualified." *Allen v. State Bd. of Elections*, 393 U.S. 544, 592 (1969) (Harlan, J., concurring in part and dissenting in part).

Republican Appellants were permitted to rely upon the conduct of the case "as litigated to conclusion by the remaining parties." Brooks Mtn. at 16a. The remaining parties, the Plaintiffs and the State Defendants, had adequately framed the issue to the satisfaction of the Republican Appellants by their objections and answers. There was no need at that point for the Republican Appellants to take advantage of the permission given them by the Order of April 29, 1982, and the Order of September 26, 1983, to file a separate pleading of their own.

Thus, the Brooks Plaintiffs could not have been prejudiced by the failure of the Republican Appellants independently to raise in October the issues already raised by the State Defendants. When it became apparent to the Republican Appellants that the State Defendants did not intend to pursue some of the issues of law raised by their answers, they exercised their right to protect their interests by arguing those issues themselves in the pre-trial brief permitted by Paragraph 7 of the Order of September 26, 1983. See Appendix, *infra*. Indeed, the Brooks Plaintiffs admit that the District Court's opinion "specifically considered" the Republican arguments. Brooks Mtn. at 6. The Brooks Plaintiffs, despite this extensive participation of the Republican Appellants, did not raise the standing issue until after trial, *id.*, at 10 n.7, but were rebuffed by the District Court's Order of Clarification of January 25, 1984, specifying that the issues presented had been considered on their merits. J.S. at 36a. The Republican Appellants are therefore free to raise the same arguments before this Court on appeal.

III. THE BROOKS PLAINTIFFS HAVE FAILED TO PRODUCE SUBSTANTIAL SUPPORT FOR THEIR CONSTRUCTION OF SECTION 2.

The Brooks Plaintiffs rest their entire case upon their interpretation of the Senate Report. They offer nothing in the language of the statute itself, applicable rules of statutory construction, or any other portion of the legislative history which lends support to their position. Without such additional support, the Judgment below cannot stand.

The Brooks Plaintiffs make no attempt whatsoever to answer the Republican Appellants' argument based on rules of statutory construction. J. S. at 14-17. While quoting selectively from the House Report, they do not attempt to explain away its clear attempt to import the substantive standard of Section 5 into the amended version of Section 2. *Id.*, at 11. Although the Republican Appellants pointed out that no one explained and endorsed the standard set out in the Senate Report on the floor of either House, *id.*, at 20-21, the Brooks Plaintiffs make no

effort to fill this gap in the legislative history.[5] Finally, they completely ignore the viewpoint of the President whose opposition forced the compromise in the Senate Judiciary Committee. *Id.*, at 19 & n.7.

The Brooks Plaintiffs' argument from statutory language is that because Section 2 includes the word "results", it must necessarily incorporate every aspect of the "results test" as elaborated in the crevices of the Senate Report. Brooks Mtn. at 17 & n.9. No such connection between that simple statutory verb and the mystifying scheme of the Senate Report can be drawn. As Judge Grady has explained:

> I do not read the amendment as providing for a "results" test. The phrase used to define the test for determining whether a protected group has "less opportunity than other members to participate in the political process and to elect representatives of their choice" is "the *totality of the circumstances.*" The totality of circumstances would certainly include the "results" of a redistricting, but the results are not coterminous with the test. The test is the *totality* of circumstances .... .

Rybicki v. State Bd. of Elections, 574 F. Supp. 1147, 1161 n.3 (N. D. Ill. 1983) (Grady, J., dissenting in part and concurring in part) (emphasis in original).

The totality of the circumstances, as embodied in the new Section 2, is exactly the test which this Court applied in *Rogers v. Lodge*, 458 U.S. 613, 622-27 (1982). The very existence of *Rogers* demolishes the false dichotomy set up by the Brooks Plaintiffs and the Fifth Circuit in *Jones v. City of Lubbock*, 727 F.2d 364, 375 (5th Cir. 1984), between the results test and the intent test as applied in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The undeniable fact that Congress intended to reject the *City of Mobile* test does not mean that it necessarily adopted the results test.[6] Indeed, the totality of the circumstances test was explicitly endorsed by supporters of the compromise. Senate Hearings, App. at 77-79 (remarks of Sen. Specter).

[5] The Republican Appellants have elsewhere explained that the legislative history emphatically rejects the Senate Report's oblique support of the sort of race-conscious remedies imposed by the District Court. Compare S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982) [hereinafter cited as Senate Report] with Republican Mem. at 19-21. This Court has recently construed similar legislative history as precluding race-conscious remedies. *Firefighters Local Union No. 1784 v. Stotts*, ____ U.S. ____, 104 S. Ct. 2576, 2588-90 & nn. 13-15 (1984). The rejection of race-conscious remedies leads inexorably to the rejection of the District Court's construction of the substantive right. See Republican Mem. at 22.

[6] Indeed, the House quite clearly thought that it had adopted the effects test of Section 5. J.S. at 10-12. The whole point of the compromise was to

For this reason, the negative testimony of Senator Dole cited by the Brooks Plaintiffs, Brooks Mtn. at 18 & n.10, is of little aid in establishing the positive meaning of the statute. Comparing these statements with Dole's other remarks, J.S. at 21-22,[7] demonstrates at most that Dole wanted to eliminate the intent standard but had no idea how to do it or what to put in its place. Such inconsistency from the chief sponsor of the compromise[8] demonstrates that his analysis lacks "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 322 U.S. 134, 140, (1944).[9]

Thus, it is completely absurd to intimate that the President is bound by Senator Dole's incoherent explanation of the compromise. Brooks Mtn. at 18. It is much more reasonable to assume that those supporters of the bill who shared the President's misgivings about the House bill more accurately reflect his view of the final compromise. See J.S. at 6-7, *Allain v.*

ameliorate the severity of the House test, because even Senator Dole had "some serious reservations ... about section 2 of the House-passed bill." Voting Rights Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. App. 59 (1982) [hereinafter cited as Senate Hearings] (remarks of Sen. Dole).

[7] Even Senator Dole's remarks in floor debate, while somewhat more focused than his additional views in the Senate Report, fail to meet this Court's standard for persuasiveness as legislative history: "Oral testimony of witnesses and individual Congressmen, unless very precisely directed toward the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself." *Regan v. Wald*, _____ U.S. _____, 52 U.S.L.W. 4966, 4970 (U. S. June 28, 1984.) In this case, the enacted language precisely adopts the rule of *White v. Regester*, 412 U.S. 755, 765-66 (1973). See J.S. at 12-14.

[8] Dole's statements can be rendered consistent with each other only upon the assumption that the Republican Appellants are correct in their contention that Section 2 applies only to registration and voting. Those were the aspects of the electoral process mentioned by Senator Dole in his floor discussions with Senator Thurmond and Senator Gorton. J.S. at 21. He emphasized the same point before the Committee, wondering, "if the right to exercise a franchise has been denied or abridged, why should plaintiff have to prove that the deprivation of this fundamental right was intentional." Senate Hearings, App. at 59-60. Of course, if Congress had in mind such a traditional view of the scope of the right to vote, the Judgment of the District Court cannot stand. See J.S. at 7-9.

Indeed, this Court should rule that Section 5 embodies the same traditional view of the right to vote. Notwithstanding the assertions of the Brooks Plaintiffs, Brooks Mtn. at 21 n.13, the necessity to fit the new Section 2 together with the old Section 5 does present new issues. These provisions cohere in a reasonable fashion only if this Court gives them the same scope as the Fifteenth Amendment. See J.S. at 6-9.

[9] This Court has held the *Skidmore* factors to be relevant to the analysis of legislative history. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 120 (1980).

Brooks, No. 83-2053.[10] The true effect of the compromise was best stated by Representative Hyde, the ranking Republican member of the House Subcommittee: "[T]he language adopted through the Senate compromise is language which was rejected in the House and which, therefore, represents the intent standard articulated by *White*, not an effect standard which some would suggest." 128 Cong. Rec. H3842 (daily ed. June 23, 1982) (remarks of Rep. Hyde). The *White* test was explained in *Rogers* and was incorporated into Section 2. Whatever the Senate Report may say, that is what the Congress and the President did, and this Court must give effect to the language they chose[11] by reversing the Judgment of the District Court.

IV. THE BROOKS PLAINTIFFS HAVE FAILED TO DEMONSTRATE A CONSTITUTIONAL BASIS FOR SECTION 2.

The Brooks Plaintiffs argue that Congress has the authority to go beyond the substantive prohibitions of the Fifteenth Amendment in enforcing the right to vote,[12] but proceed to deny that the seminal case, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), has any relevance. Brooks Mtn. at 23-24 n.15. They make the odd argument that Congress has more power to go beyond the substantive bounds of the Constitution on a nationwide basis than by carefully tailoring the remedial effort to the areas which need it. This Court has always held the contrary. Race-consciousness is permissible under our Constitution only when "precisely tailored to serve a compelling

[10] The charge that "appellant simply reiterates the arguments made by those who opposed passage of this legislation," Brooks Mtn. at 20, is a complete misrepresentation of the record. The record reflects that, for instance, Senator Hatch and Representative Hyde voted for this legislation in subcommittee, committee, and on the floor.

[11] The Brooks Plaintiffs assert that the Republican Appellants are merely seeking to turn this Court "into a debating society" because they "lost [their] arguments in the legislative forum of Congress." Brooks Mtn. at 13. This charge begs the question. Section 2 is a legislative compromise amenable, like most compromises, to differing interpretations. Not until this Court chooses among interpretations can it be said who won or lost in Congress.

[12] The Brooks Plaintiffs also argue that Congress has the power to reach redistricting decisions under the Fourteenth Amendment. Brooks Mtn. at 21 n.13. However, there is nothing in the Act to suggest that Congress intended to broaden the scope of Section 2 to include situations covered by the Fourteenth Amendment. *Smith v. Winter*, 717 F.2d 191, 196 n.3 (5th Cir. 1983). Where Congress has intended to rely on the Fourteenth Amendment, it has said so in the Act, not the committee reports. See *Allen*, 393 U.S. at 589 n.6 (Harlan, J., concurring in part and dissenting in part). The failure of Section 2 to refer to the Fourteenth Amendment, especially so soon after this Court had held in *City of Mobile* that Section 2 has the same meaning as the Fifteenth Amendment, see J.S. at 7, clearly indicates that the statute does not extend beyond the boundaries of the Fifteenth Amendment to reach substantive violations covered only by the Fourteenth.

governmental interest." *Regents of the University of California v. Bakke*, 438 U.S. 265, 299 (1978) (Opinion of Powell, J.). See *Fullilove v. Klutznick*, 448 U.S. 448, 546-47 (1980) (Stevens, J., dissenting). Section 2, as construed by the District Court, is valid only if conditions exist across the nation which require such an extraordinary enforcement tool.

Despite conducting extensive hearings, both the House and Senate Committees found no evidence of voting discrimination on a nationwide basis. H.R. Rep. No. 97-227, 97th Cong., 2d Sess. 34 n.113 (1981); Senate Report, at 15. After discussing on the Senate Floor each of the alleged violations of constitutional rights found in the House and Senate Reports, Chairman Hatch concluded: "The only clearly established final judgment of unconstitutional discriminatory intent in the last seven years was made against Escambia County, Florida." 128 Cong. Rec. S6643 (daily ed. June 10, 1982) (remarks of Sen. Hatch). This litany of hearsay and rumor before Congressional committees, so effectively demolished by Chairman Hatch, cannot compare with the detailed record of judicially established violations of the Constitution itself which this Court found persuasive in *South Carolina v. Katzenbach*, 383 U.S. at 308-15. The extraordinary circumstances which this Court then found compelling simply have not been shown, either in the record made before Congress or the record made before the District Court.

The Brooks Plaintiffs then argue that it does not really matter whether the Congressional justifications for this statute have any bearing upon this particular case, so long as there is a rational basis for the Congressional supposition that they might apply. Brooks Mtn. at 26-27 n.16. However, this position conflicts directly with their earlier assertion that "there is no 'over-inclusion problem,' " *id.*, at 23-24 n.15, because the Court is required to find the existence of discrimination in each individual case. This echoes the views of the authors of the Senate Report, who asserted that the overinclusion argument "ignores the very terms and operation of the provision, which confine its application to actual racial discrimination." Senate Report, *supra*, at 43. Thus, even the authors of the Senate Report intended that plaintiffs would have to show "actual racial discrimination"[13] in each individual case. No such

[13] When this Court has talked about "actual racial discrimination", it has always made clear that a claim of discrimination "must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). What the Brooks Plaintiffs mean by "actual racial discrimination" is an electoral scheme which disadvantages blacks in some undefined fashion. That is not the same thing at all. Neither Congress nor the Brooks Plaintiffs are invested with the power of Humpty Dumpty to redefine legal terms at will. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 (1978).

showing having been made here, the Constitution does not permit the District Court to discard an otherwise permissible redistricting scheme.

CONCLUSION

For the reasons stated above and in the Jurisdictional Statement filed in this cause, the Republican Appellants submit that the Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

*Michael B. Wallace

JONES, MOCKBEE & BASS
1080 Flynt Drive, Suite E
P. O. Box 55507
Jackson, Mississippi 39216
Tel. (601) 939-3895

Attorneys for Mississippi
Republican Executive Committee,
Appellants

* *Counsel of Record*

APPENDIX

IN THE

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISION

DAVID JORDAN, et al., Plaintiffs

v. NO. GC82-80-WK-0

WILLIAM WINTER, et al., Defendents

OWEN H. BROOKS, et al., Plaintiffs

v. NO. GC82-81-WK-0

WILLIAM WINTER, et al., Defendants

ORDER

Following remand of the above case, the court called a status conference between the parties to establish further procedures as follows:

1. Plaintiffs shall have the burden of establishing that the so-called Simpson redistricting plan heretofore adopted by the three-judge panel violates §2 of the Voting Rights Act of 1965, as amended in 1982. This will accord plaintiffs the right to open and close in presentation of proof and argument. Plaintiffs are directed to file within twenty (20) days from this date written objections to the Simpson plan, specifying in what particulars and on what grounds the redistricting plan offends new §2 of the Voting Rights Act. Defendants shall have ten (10) days from receipt of objections to make written specific responses thereto. No further pleadings in the Brooks case shall be allowed.

2. Defendants are allowed seven (7) days within which to file motion to dismiss the Jordan case for failure to perfect appeal to the Supreme Court. The State shall submit brief to accomplish this motion. Jordan plaintiffs are allowed ten (10) days thereafter to respond with opposing brief. No further briefs shall be allowed on this issue.

3. Plantiffs are allowed seven (7) days from this date in which to file deposition of T. H. Campbell, III, allegedly repudiating testimony given by him as a witness at the prior hearing of this cause.

4. Johnnie E. Walls, Jr., Esquire, of Greenville, Mississippi, and Hubbard T. Saunders, IV., Esquire, of Jackson, Mississippi,

are hereby designated as lead counsel for the plaintiffs and defendants respectively. It shall be the obligation of lead counsel to notify all co-counsel in the case of any notices, orders or directions from the court.

5. The parties are directed and encouraged to maximize depositions of witnesses and to submit synopsis of such testimony at time of trial.

6. The parties are directed to maximize the areas of stipulated fact, particularly with reference to all statistical data and information regarding the 1982 Democratic Primary and General Election results of the race for Congress in the Second Congessional District. The court will expect the parties to stipulate not only to the black voting age population in each of the counties and precincts forming District No. 2, but as near as possible estimated percentages of the registered black voters in each of the counties and precincts of District No. 2.

7. Discovery, including taking of depositions for evidentiary purposes, shall be completed not later than December 2, 1983, stipulations and pretrial briefs shall be submitted on December 9, 1983, and evidentiary hearing and oral argument is set for Monday, December 19, 1983, at 10:00 a.m., in the United States Courthouse in Greenville before a three-judge panel. All submissions of stipulations and briefs shall be in triplicate, mailed directly to Chief Judge Clark, Chief Judge Senter and the undersigned as managing judge.

THIS, the 26th day of September, 1983.

WILLIAM C. KEADY

United States District Judge

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
FILED
OCT 28 1984
ALEXANDER L. STEVAS
CLERK

OCT 26 PAGE 18
TO BE PRINTED

No. 83-1722

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

Appellants

v.

OWEN H. BROOKS, ET AL.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

* MICHAEL B. WALLACE

JONES, MOCKBEE & BASS
1080 Flynt Drive
Suite E
Post Office Box 55507
Jackson, Mississippi 39216
Tel. (601) 939-3895

Attorneys for Appellants

* Counsel of Record

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 83-1722

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE, APPELLANTS

V.

OWEN H. BROOKS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

APPELLANTS' SUPPLEMENTAL BRIEF

This Supplemental Brief is filed by the Appellants, the Mississippi Republican Executive Committee, pursuant to this Court's Rule 16.6, to consider the effect of this Court's decision in Strake v. Seamon, No. 83-1823, 53 U.S.L.W. 3234 (Oct. 1, 1984), and its request for the views of the Solicitor General in Edmisten v. Gingles, No. 83-1968, 53 U.S.L.W. 3235 (Oct. 1, 1984).[1]

I. STRAKE NECESSARILY HOLDS THAT REPUBLICANS HAVE STANDING TO SUE UNDER THE VOTING RIGHTS ACT.

The Brooks Plaintiffs have moved to dismiss this appeal on the grounds that the Appellants lack standing under Article III of the Constitution to assert the rights of Republican voters or candidates for office. Motion to Dismiss or Affirm [hereinafter cited as Brooks Mtn.] at 10-13. In Strake, the Appellant was the State Chairman of the Republican Party, Jurisdictional Statement at II, Strake [hereinafter cited as Strake J.S.], and Texas State officials moved to dismiss on the grounds that "Republicans are not among the minorities protected by the Voting Rights Act. 42 U.S.C. §1973." Motion to Dismiss or Affirm at 9, Strake.

This Court declined to dismiss Strake's appeal, but affirmed on the merits the District Court's denial of relief under newly amended Section 2 of the Voting Rights Act. Had this Court found that Texas Republican officials lacked standing to pursue an appeal under the Voting Rights Act, it could not have affirmed the District Court's judgment. Where Article III standing is not present, an "appeal must be dismissed on the grounds that appellant has no standing to litigate the constitutional question which the record presents." Tileston v. Ullman, 318 U.S. 44, 46 (1943). This Court's refusal to dismiss the appeal in Strake necessarily encompasses a holding that it had jurisdiction to decide the appeal. Because Mississippi Republican officials must have the same constitutional standing to appeal as do Texas Republican officials, the decision in Strake necessarily precludes the Brooks Plaintiffs' argument that the Appellants lack standing.

II. THE AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT IN STRAKE REQUIRES THE REVERSAL OF THE DISTRICT COURT'S JUDGMENT IN THIS CASE.

The Appellants are well aware that a summary affirmance by this Court approves only the judgment of the District Court and not the reasoning of its opinion. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975); Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C. J., concurring). Nevertheless, litigants and courts necessarily suppose that there must be some theory of law, whether or not articulated by the District Court, which supports its judgment. There is no conceivable theory of law supporting the judgment in Strake which would not require the reversal of the District Court's judgment in this case.

The Appellants have already explained that the District Court's decision in Strake is necessarily inconsistent with every other case decided under newly amended Section 2, including

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[1] These comments also apply to the appeal in Allain v. Brooks, No. 83-2053, insofar as questions I and II presented by the State Defendants in that appeal are substantially the same as questions 2 and 3 presented by the Appellants herein. Because the appeal of the Brooks Plaintiffs in Brooks v. Allain, No. 83-1865, raises only remedial issues, these comments are relevant thereto in the sense that, should this Court conclude there has been no substantive violation of law, the remedial issues would become moot.

this one. Memorandum of the Appellees, Mississippi Republican Executive Committee, in Opposition to Jurisdictional Statement at 12-16, Brooks v. Allain [hereinafter cited as Republican Mem.]. In United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984), appeal pending, No. 84-243, Judge Wisdom identified four factors as controlling in Section 2 cases: racially polarized voting, an absence of minority elected officials, the history of discrimination, and present socioeconomic disparities between the races. "Certainly, when the plaintiffs establish these factors and no other factors weigh strongly against the plaintiffs' case, dilution must be found." 731 F.2d at 1574. Each of those factors was present in Strake, but this Court nevertheless affirmed a judgment that Section 2 had not been violated.[2]

The majority of the District Court in Strake made no explicit findings regarding socioeconomic disparities or a history of discrimination. But see Seamon v. Upham, 536 F. Supp. 931, 987-94 (E. D. Tex.) (Justice, J., concurring), rev'd, 456 U.S. 37 (1982). Nevertheless, those facts are amply set out in regard to Texas in general and Dallas County in particular in the very case Congress chose to codify in Section 2, White v. Regester, 412 U.S. 755 (1973). There is also an absence of elected minority officials in that, as in Mississippi, both of the Congressional seats in question are occupied by whites. Likewise, although it discounted the factor, the District Court nevertheless found "that bloc voting still exists, to a certain degree in Dallas County." Strake J.S. at A-1-9-10 n.4. Certainly, polarized voting existed to an extent found controlling in other cases. The District Court in Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), appeal pending, No.

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[2] The District Court in this case found each of these four factors to be present. Although the Appellants' Jurisdictional Statement does not challenge the validity of those findings, the State Defendants do so in question III of their Jurisdictional Statement in Allain v. Brooks. These Appellants defensively assert the invalidity of those factual findings in their opposition to the Brooks Plaintiffs' request for additional relief. Republican Mem. at 4-9.

83-1968, found polarized voting to be "the linchpin of vote dilution by districting," 590 F. Supp. at 355, and found severe polarization to exist whereever "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election," id., at 368. Under that test, the election returns cited by the District Court in Strake clearly show that racial polarization existed in Congressional elections in Dallas County. Strake J.S. at A-1-15; Seamon v. Upham, 536 F. Supp. at 953.

If the District Court's decision in this case and other Section 2 decisions are to be distinguished from Strake, it must be on the question of whether or not "other factors weigh strongly against the plaintiffs' case." Marengo County, 731 F.2d at 1574. Appellants have already argued that no valid distinction can be drawn on the basis of the incumbents' responsiveness to the needs of minority voters. Republican Mem. at 15. Likewise, the District Court's decision in Strake to defer to the State's policy decision "to create two impact districts instead of one safe district," Strake J.S. at A-1-14, is inconsistent with the District Courts' decisions in this case and in Gingles. In Gingles the District Court found that the choice "is one that Congress has, in effect, committed to the judgment of the black community to whom it has given the private right of action under amended §2." 590 F. Supp. at 375 n.33. In both this case and in Strake, of course, the black community through its class representatives chose to seek one safe seat, a judgment which this Court's affirmance in Strake refused to honor. The District Court in this case went even further than did the North Carolina court in denying effect to the high impact district policy. "The results test required by Section 2 precludes dependency on this policy." Brooks Mtn. at 11a. The District Court's reliance upon such a policy in Strake is squarely inconsistent with the District Court's holding in this case that Congress has precluded such reliance.

Thus, no valid distinction can be drawn between this case and Strake with regard to any of the factors which courts have deemed relevant under Section 2. The only difference between the cases is that the Texas court deferred to the state policy of not creating a single safe district while the Mississippi court did not. There being no basis upon which the two cases can be distinguished, this Court's affirmance of the District Court's decision in Strake requires the reversal of the District Court's decision in this case.

III. THE RELATIONSHIP OF SECTION 2 WITH SECTION 5, UPON WHICH THIS COURT HAS SOUGHT THE SOLICITOR GENERAL'S VIEWS IN EDMISTEN, IS ALSO RAISED BY THE APPELLANTS' JURISDICTIONAL STATEMENT IN THIS CASE.

The second question presented by the appeal from the decision in Gingles is "[w]hether preclearance of a redistricting plan under Section 5 of the Voting Rights Act [42 U.S.C. §1973c] precludes relitigation of the issue of discriminatory result of that plan by private plaintiffs under Section 2."[3] Jurisdictional Statement at i, Edmisten v.

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3 The other questions presented by Edmisten are largely controlled by Strake. It is now clear that minorities are not guaranteed "the right to safe electoral districts whereever there occurs a sufficient concentration of minority citizens to create at least one safe black district which insures black electoral success." J.S. at i, Edmisten. Likewise, we now know that racial bloc voting sufficient to prove a dilution claim does not exist "as a matter of law whenever less than 50% of the white voters cast ballots" for the candidate supported by blacks. Id. The Edmisten appeal also presents the question of "[w]hether the court erred in rejecting substantial evidence that many black leaders were satisfied" with the challenged electoral scheme. Id. Strake indicates that courts should place substantial reliance on minority support for the challenged plan. Strake J.S. at A-1-3-6.

Gingles. The Appellants in this case raised the question of "[w]hether the amendment to Section 2 ... has any bearing upon litigation under Section 5."[4] J.S. at i. The Appellants submit that these questions are essentially identical.

The District Court's 1982 decision in this case held that its original remedial order fully satisfied the requirements of Section 5. J.S. at 14a-15a. The Justice Department made an identical finding in North Carolina, Gingles, 590 F. Supp. at 375-76, as it had in Texas, Strake J.S. at A-1-6-7. The only difference between this case and those cases is procedural, not substantive. The State Defendants have never submitted the District Court's 1982 plan to the Justice Department for preclearance under Section 5, but the Justice Department has nevertheless informed this Court that the plan fully satisfies the requirements of that Section. Brief for the United States as Amicus Curiae at 11-12, Brooks v. Winter, ___ U.S. ___, 103 S. Ct. 2077 (1983). Section 5 provides that only "the chief legal officer or other appropriate official of such State" may submit a plan for preclearance. Certainly, the State Defendants' failure to comply with those procedures cannot be held to foreclose the

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4 The Appellants have also raised other issues which the Solicitor General need not address in Edmisten. The Solicitor General has already expressed his view that Section 2, as construed by the Eleventh Circuit, is not unconstitutional. Motion to Dismiss or Affirm at 12-14, Marengo County Commission v. United States, No. 84-243. Of course, the Justice Department routinely defends the constitutionality of Congressional legislation unless it infringes upon the prerogatives of the Executive Branch. See, e.g., Immigration & Naturalization Service v. Chadha, ___ U.S. ___, 103 S. Ct. 2764 (1983). For that reason, the Appellants have already suggested that this Court should place more weight on the views expressed by the Department before Congress when it was not similarly constrained. See J.S. at 24 n.13. While the appeal in Marengo County does not squarely present the question of whether or not amended Section 2 incorporates an intent test, the Solicitor General's Motion to Dismiss or Affirm at 14-18 suggests that his view is that it does not. Neither Edmisten nor Marengo County presents the question of "[w]hether Section 5 and Section 2 as amended apply to redistricting decisions." J.S. at i.

rights of these Appellants when the Justice Department and the District Court have already found the 1982 plan to satisfy Section 5.

Thus, the views of the Solicitor General on the question presented in Edmisten will be highly relevant to this Court's consideration of the first question presented by these Appellants. If the Solicitor General believes, and if this Court agrees, that the Justice Department's approval of an electoral plan under Section 5 precludes a judicial challenge under Section 2, then the District Court's conclusion that its 1982 plan violated Section 2 must necessarily be reversed.

CONCLUSION

For the additional reasons stated herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

Michael B. Wallace

* Michael B. Wallace

JONES, MOCKBEE & BASS
1080 Flynt Drive, Suite E
P. O. Box 55507
Jackson, Mississippi 39216
Tel. (601) 939-3895

Attorneys for Appellants

* Counsel of Record

OPINION

SUPREME COURT OF THE UNITED STATES

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
83–1722 (5)
v.
OWEN H. BROOKS ET AL.

OWEN H. BROOKS ET AL.
83–1865 (4)
v.
WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

WILLIAM A. ALLAIN ET AL.
83–2053 (3)
v.
OWEN H. BROOKS ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Nos. 83–1722, 83–1865 AND 83–2053. Decided November 13, 1984

The judgment is affirmed.

JUSTICE STEVENS, concurring.

Although I agree that a summary affirmance of the judgment of the District Court is entirely appropriate in this case, what has been written in dissent prompts me to make two important points.

First, there is little, if any, resemblance between the argument advanced in the dissenting opinion and the specific questions presented in the parties' jurisdictional statements. This Court has determined that summary affirmances "reject the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977). The only questions presented in the jurisdictional statement that the Mississippi Republican Executive Committee filed in case No. 83–1722 read as follows:

"1. Whether Section 5 and Section 2 as amended apply to redistricting decisions.

"2. Whether the amendment to Section 2 or any other portion of the Voting Rights Amendments of 1982 has any bearing upon litigation under Section 5.

"3. Whether Section 2 as amended prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race.

"4. Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." Juris. Statement i.[1]

Second, the dissent does not fairly characterize the opinion of the District Court. That opinion does not "in effect" construe the recent amendment to § 2 of the Voting Rights Act as entitling "minority plaintiffs, in a State where there exist present effects from past discrimination, to have a State redistricting plan invalidated if it has failed to provide at least one district in which the 'minority' is a majority of the eligible voters." *Post*, at 1. The dissent buttresses this incorrect impression by attributing the following statement to the District Court:

"The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would

[1] The Jurisdictional Statement that William A. Allain and others filed in No. 83–2053 presents two questions that are similar to those presented in No. 83–1722 and also presents the question whether the District Court erroneously found as a fact that black persons in Mississippi—and especially in the Delta generally—have less education, lower incomes, and more menial occupations than white persons, and that there has been racially polarized voting in Mississippi. See n. 2, *infra*. Nothing in the dissenting opinion indicates that it believes these questions merit full briefing and argument. In my judgment the jurisdictional statement in No. 83–1965 raises a more serious question, but I do not understand that the dissenting opinion favors review of that question.

have a 'clear black voting age population majority of 52.83 percent.'" *Post*, at 4.

What the District Court actually said was this:

"In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections." App. to Motion to Dismiss or Affirm of Owen H. Brooks 14a.

The District Court's conclusion that its remedy was required was not based on any notion that the law gives every minority group an entitlement to some form of proportional representation. Its conclusion was quite the contrary. It rested on specific findings of fact describing the impairment—or "dilution" if you will—of the voting strength of the black minority in Mississippi. Those factual findings reveal that Mississippi has a long history of de jure and de facto race discrimination,[2] that racial bloc voting is common in Missis-

[2] Regarding past discrimination, the District Court carefully found that Mississippi had often used poll taxes, literacy tests, residency requirements, white primaries and violence to intimidate black persons from registering to vote. More importantly, the court found "that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout." App. of Motion to Dismiss or Affirm of Owen H. Brooks 9a. Additionally, the court wrote:

"Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

"The evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi. Blacks in Mississippi, especially in the Delta region, generally have less education, lower in-

sippi, and that political processes have not been equally open to blacks.[3]

Because I find no merit in any of the specific challenges presented in the parties' jurisdictional statements,[4] and because the record supports the District Court's findings of fact, as the dissent notes, *post*, at 10, I join the Court's summary affirmance.

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comes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. . . . Census statistics indicate lingering effects of past discrimination: the median family income in the Delta region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing." *Id.*, at 9a–10a (footnote omitted).

[3]The court also found that there existed "persuasive evidence" the Mississippi's political processes have not recently been open to black persons. In addition, the court particularly noted the following message accompanying a campaign television commercial:

"You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations." App. of Motion to Dismiss or Affirm of Owen H. Brooks 12a, n. 8.

The commercial opened and closed with a view of Confederate monuments; the candidate that ran the commercial used "He's one of us" as his campaign slogan. *Ibid.*

[4]Indeed, it should be noted that the District Court's plan would be an acceptable remedy for the violations even if it did not regard the Simpson plan itself as a violation of §2 of the Voting Rights Act as amended. For after our remand, the District Court could have appropriately decided that the policy of that Act, coupled with the findings of fact concerning the effects of historic discrimination, particularly in the Delta area, required a remedy that established at least one district in which black persons represented an effective majority of the eligible voters.

OPINION

SUPREME COURT OF THE UNITED STATES

MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE
83–1722 v.
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83–1865 v.
WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

WILLIAM A. ALLAIN ET AL.
83–2053 v.
OWEN H. BROOKS ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

Nos. 83–1722, 83–1865 AND 83–2053. Decided November 13, 1984

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The District Court's ruling in this case presents important questions concerning the construction of the recent amendment to § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973 (1982). The District Court in effect has construed the amendment to entitle minority plaintiffs, in a State where there exist present effects from past discrimination, to have a State re-districting plan invalidated if it fails to provide at least one district in which the "minority" is a majority of the eligible voters. This is so even though the challenged re-districting plan is constitutional, is not the product of discriminatory intent, and indeed was intended by the court which adopted it to "deal fairly with [the State's] black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength."

In 1982, the District Court in this case adopted a re-districting plan for Mississippi's congressional districts in order to remedy district population disparities, revealed by the 1980 census, of up to 17%. In choosing from among several plans offered by the litigants, it sought a plan that would "satisfy the one person, one vote rule and avoid any dilution of minority voting strength." *Jordan* v. *Winter*, 541 F. Supp. 1135, 1142 (ND Miss. 1982) *(Jordan I)*. The court further observed that "[w]hat is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength." *Id.*, at 1143. The court chose the so-called "Simpson" plan because it satisfied most of the state's policy considerations in districting, created two districts with 40% or better black population, and included a district where nearly 54% of the population was black.

On appeal to this Court, the judgment of the District Court was vacated and the case remanded for reconsideration in the light of the 1982 amendments to the Votings Rights Act. *Brooks* v. *Winter*, —— U. S. ——, 103 S. Ct. 2077 (1983). On remand, the District Court found that the very plan which it had approved and adopted in 1982 was unlawful under the amended §2 of the Voting Rights Act because "[t]he structure of the Second Congressional District in particular unlawfully diluted black voting strength." *Jordan* v. *Winter*, No. GC82–80–WK–0 (ND Miss., April 16, 1984) *(Jordan II)*. I think the rather remarkable conclusion that the 1982 amendments to the Voting Rights Act made unlawful a plan adopted by the District Court, which plan the District Court had adopted with a view to the requirement that "the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength," should receive plenary review by this Court.

After being presented with the census data revealing the previously mentioned population disparities between existing

congressional districts, the Mississippi Legislature in 1981 enacted a new re-districting plan. The Attorney General of the United States refused pre-clearance, however, and the Legislature adjourned without enacting a new plan. A three-judge District Court was convened to hear actions filed by two groups of Mississippi voters seeking a court-ordered interim plan for the 1982 congressional elections. That court refused to place in effect the legislative plan which had not been pre-cleared, and held the exiting districting statute unconstitutional because of the population disparities. It then adopted the "Simpson" plan from among several plans submitted to it by the litigants. *Jordan I*, *supra*.

In choosing the Simpson plan, the court followed the teaching of *Upham* v. *Seamon*, 456 U. S. 37 (1982), which requires courts to fashion interim plans that adhere to a State's political policies. The court identified Mississippi's political districting policies as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. The court specifically rejected two plans proposed by a group of black plaintiffs. These plans would have kept the predominantly black Northwest or "Delta" portion of Mississippi intact, and would have combined that area with predominantly black portions of Hinds County and the City of Jackson. Each of these plans would have resulted in one congressional district with a black population of approximately 65%. The Simpson plan, on the other hand, combined 15 Delta or partially Delta counties with six predominantly white eastern rural counties, and resulted in a congressional district with a 53% black population, but a 48% black voting population. The District Court found the Simpson Plan most nearly in accord with the State's policies articulated above. The rejected plans would have resulted in only one district with greater than 40% black population; this was contrary to the reasonable state policy established to

assure that blacks would have an effective voice in choosing representatives in more than one district. In addition, the court noted that the black plaintiffs had managed to place a high percentage of black voters in a single congressional district only through obvious and unseemly racial gerrymanders.

When this Court subsequently vacated the District Court's judgment for reconsideration in the light of the 1982 amendment the District Court held further evidentiary hearings, and concluded that its own plan violated the amended section. This violation occured, in the opinion of the District Court, because "[t]he structure of the Second Congressional District in particular unlawfully diluted black voting strength." Under the plan adopted by the District Court in 1982, the Second District had a black population of 53.77%, but blacks comprised only 48.06% of the voting age population. The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would have a "clear black voting age population majority of 52.83 percent." In doing so, the District Court "recognize[d] that the creation of a Delta District with a majority black voting age population implicates difficult issues concerning the fair allocation of political power." *Jordan II*, *supra*.

Any statute that would lead a District Court to reject a plan which it had previously found fair to all concerned in favor of one including an obligatory district with a majority black voting age population deserves careful attention, and so I turn to the language of the Voting Rights Act as amended in 1982. The District Court in its most recent opinion set out the statutory provisions toward the beginning of its opinion, but scarcely mentioned that language again, and instead went on to quote extensively from the Senate Report of the 1982 amendments. The applicable statutory language is this:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in § 4(f)(2), as provided in subsection (b).

"(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U. S. C. § 1973 (emphasis in original).

Applying the statutory language to the situation confronting the District Court after our remand, the "voting qualification or prerequisite to voting or standard, practice, or procedure" to which the amended statute is to be applied is obviously the 1982 plan adopted by the District Court. That court clearly thought so, and no other "qualification . . . standard, practice, or procedure" suggests itself. There has never been any suggestion that the plan adopted by the District Court in 1982 denied or abridged the right of any citizen to vote on account of race or color, so if that plan does violate the amended act it is because it contravenes "the guarantees set forth . . . in subsection (b).

Subsection (b), in turn, provides that a violation of subsection (a) is established if "[i]t is shown that the political

processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)." The District Court read subsection (b) as if it were totally divorced from subsection (a), and proceeded to enumerate factors in the political history of Mississippi which it felt indicated that the plan it had adopted in 1982 "unlawfully dilutes minority voting strength." *Jordan II*, *supra*. The District Court did not state what it understood the term "unlawfully dilutes minority voting strength" to mean, and since that term is nowhere used in the statutory language one is left to infer that the court derived the necessary meaning for the language from the report of the Senate Judiciary Committee which it cited at some length. The District Court's understanding of what is required by § 2 is highly questionable in light of the statute's language and legislative history. To fully evaluate the District Court's analysis it is necessary to review the events preceding the amendment of § 2.[1]

In *City of Mobile* v. *Bolden*, 446 U. S. 55 (1980), this Court wrestled with the question whether legislative "intent" to discriminate must exist in order to find that a particular legislative action violates the Voting Rights Act, or whether it was enough that the legislative action have a "discriminatory effect." In *City of Mobile* black plaintiffs had brought an action challenging the constitutionality of the city's at-large method of electing its commissioners. We produced six different opinions debating among ourselves whether discriminatory intent was required to find a violation of the Fifteenth Amendment, or whether "an invidious discriminatory purpose could be inferred from the totality of facts." *Id.*, at 95 (WHITE, J., dissenting). None of the opinions challenged the conculsion of the plurality that the Voting Rights Act as it then existed added, "nothing to appellee's Fifteenth Amendment claim." *Id.*, at 61 (Opinion of Stewart, J.).

[1] JUSTICE STEVENS' concurrence suggests that my analysis is unwarranted because the problems I perceive with the District Court's opinion were not specifically raised by the "questions presented" in appellants' jurisdictional statements. I believe, however, that several of the "questions presented" "fairly include" the issues that I address. In particular, question 3, cited *supra*, at —— (STEVENS, J., concurring), raises the question of the scope of activity Congress intended to proscribe under § 2. I need not agree 100% with appellants' position—that § 2 only proscribes intentionally discriminatory conduct—to reach the question whether the District Court misconstrued Congress' intent.

It is clear that the 1982 amendment was precipitated in large part by the holding of *City of Mobile*. But the language used in the amended statute is, to say the least, rather unclear. The legislative history indicates that Congress was well aware of the "intent"—"effects" dichotomy, and of the problems with identifying actions with discriminatory "effects." The bill originally passed the House under a loose understanding that § 2 would prohibit all discriminatory "effects" of voting practices, and that intent would be "irrelevant." H. R. Rep. No. 97–227, p. 29. This version met stiff resistance in the Senate, however. Two Senate subcommittees held extensive hearings, at which testimony was given concerning the tendency of a "results" approach to lead to requirements that minorities have proportional representation, or to devolve into essentially standardless and ad hoc judgments. See, *e. g.*, Hearings on S. 53 et al. before the Senate Subcommittee on the Judiciary, 97th Cong., 2d Sess., 1309–1313, 1334–1338 (1982). The subcommittees could not agree on the proposed amendment, and at that point Senator Dole stepped in with a proposed compromise. The compromise bill retained the "results" language but also incorporated language directly from this Court's opinion in *White* v. *Regester*, 412 U. S. 755 (1973), and strengthened the caveat against proportional representation. The debates on the compromise focused on whether the "results" language would nevertheless provide for proportional representation, or merely for equal "access" to the political process. Senator Dole took the position that "access" only was required by amended § 2: "[T]he concept of identifiable groups having a right to be

elected in proportion to their voting potential is repugnant to the democratic principles on which our society is based." See 128 Cong. Rec. S6961 (1982) (remarks of Senator Dole). This position was adopted by many supporters of the compromise in the Senate, and the bill passed as written.

The District Court apparently felt obliged to reach a conclusion in tension with this legislative history because of language in the Senate Judiciary Committee Report on the 1982 amendment stating that the "results" language of § 2(a) was meant to "restore the pre-*Mobile* [v. *Bolden*] legal standard which governed cases challenging electoral systems or practices as an illegal dilution of the minority vote." S. Rep. No. 97–417, p. 27 (1982). The Report then enumerates the factors courts may consider in deciding whether plaintiffs have established a violation of § 2, factors apparently derived from this Court's opinion in *White* v. *Regester*, *supra*.[2] Applying these "factors," the District Court found that Mississippi has

[2] Those factors are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized.

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 97–417, *supra*, pp. 28–29.

a long history of *de jure* and *de facto* race discrimination, which has present effects in impeding black voter registration and turnout. It noted that although blacks constitute 35 percent of the state's population, no black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Furthermore, the court found socioeconomic disparities between blacks and whites in the Delta area, and finally, that voters in Mississippi have previously voted and continued to vote on the basis of the race of candidates for elective office. The District Court concluded from this that the adoption of a plan in which the Second District contained less than a majority of voters from a protected class "diluted" the class' voting strength.

Thus we have a statute whose meaning is by no means easy to determine, supplemented by legislative history which led the District Court in this case to conclude that only the inclusion within one congressional district of a majority black voting age population could satisfy the Act. I think it can be fairly argued from the legislative history, and from the express caveat that the section was not intended to establish a right to proportional representation, that in amending § 2 Congress did not intend courts to supersede state voting laws for the sole purpose of improving the chance of minorities to elect members of their own class.

To best understand the meaning of the Senate Committee's references to our decisions in *City of Mobile* and *White* v. *Regester*, it is essential to remember that those cases dealt with challenges to *multi-member legislative districts*. It is only in this context that phrases such as "vote dilution" make any sense, for the phrase itself suggests a norm with respect to which the fact of dilution may be ascertained. In the case of multi-member districts, the norm available for at least theoretical purposes is the single-member district. But when we turn from attacks on multi-member districts to attacks on the way lines are drawn in creating five single-member con-

gressional districts, as in the case at hand, phrases such as "vote dilution" and factors relied upon to determine discriminatory effect are all but useless as analytical tools. Neither *White* v. *Regester*, *supra*, *City of Mobile* v. *Bolden*, *supra*, nor *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), a case also dealing with challenges to multi-member legislative districts, ever suggested that their analysis should be carried over to challenges addressed to single member districts. And whichever of the views espoused in *City of Mobile* is found to have been adopted by the 1982 amendment, it would seem that a plan adopted by the District Court under the command "that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength" should be home free under either test.

Under this view, the District Court's most recent opinion and judgment seems to me to present virtually insuperable difficulties. Although we may regretfully concede that the District Court's findings were correct, it nevertheless seems a non sequitur to say that the past discrimination, and its present effects, have "resulted" in "dilution" of minority voting strength *through the adoption of this particular districting plan*. To the extent that less blacks vote due to past discrimination, that in itself diminishes minority voting strength. But this occurs regardless of any particular state voting practice or procedure. As the plurality opinion in *City of Mobile* recognized in another context, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile*, 446 U. S., at 74. Here the only finding even remotely related to the boundaries of the Second Congressional District under the 1982 plan is what the District Court referred to as "socioeconomic disparities between blacks and whites in the Delta area." The findings as to the history of racial discrimination and bloc voting apparently obtained throughout the State. It is obvious that no plan adopted by

the Mississippi Legislature or the District Court could possibly have mitigated or subtracted one jot or tittle from these findings of past discrimination. What we have, therefore, is in effect a declaration by the District Court that because of these past examples of racial discrimination throughout the State, any plan adopted by either the legislature or by a court which did not give blacks one of five congressional districts in which they had a majority of the voting age population violated the 1982 amendments to the Voting Rights Act. Under this analysis, cause and effect are entirely severed.

For these reasons, I think the judgment of the District Court presents substantial questions concerning the interpretation of a new amendment to the Voting Rights Act of 1965, and that the Court seriously misapprehends its obligation in such a case when it summarily affirms the judgment of the District Court.